

Print name. H. Seacott. 1676
in the name of the
with name
of the
1512
THE
OFFICE and DUTY
OF
EXECUTORS:

Or, A TREATISE of
***Wills and Executors*, directed to**
***Testators*, in the choice of their *Executors*, and Contrivance of their *Wills*.**

With Direction for *Executors* in the Execution
of their Office according to the Law; and for
***Creditors* in the recovery of their Debts.**

With divers other Particulars, very useful and profi-
table for all Persons, be they either *Executors*,
***Creditors*, or *Debtors*.**

Compiled out of the Body of the Common Law, by
***Thomas Wentworth*, late Benchet of *Lincoln's Inn*.**

To which is added

An Appendix, wherein are the nature of Testaments,
***Executors*, *Legataries general*, and divers other**
very material things relating to the same, shortly
Methodized for the use of Persons concerned.

By T. M. Esquire.

London, Printed for Henry Twyford in *Vine*
***Court*, *Middle Temple*, 1676.**

Office and Bureau

Director

of the

and

to

and

and

and

and

and

and

and

and

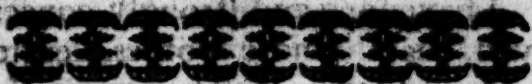
and

and

and

and

and



The **PREFACE.**

A Midst the Readers of these Discourses, some not yet unfriendly may ask, perhaps, *Quorsum hæc?* or *Quorsum sic?* Why have we a Tractate and Discourse Legal? or, Why in *English*, and not rather in the Law-language? To whom, yea also to others, perhaps less inquisitive, it will be, as I think, a thing not unpleasing, to hear some reason rendred, why I have set my head and hands to this work so little in use with those of our Profession; why also in *English* rather than in the Language wherein our Volumes of Law are for the most part and well-nigh wholly written.

First, for the matter, *viz.* my thus Commenting or making a Tractate upon a Legal Theme.

The Preface.

1. I have long and strongly conceived, that the more Nobles, Gentlemen and others, shall be acquainted with the Law of the Land, and the Justness, Equity, Prudence and Providence thereof the more they will love it and affect it. *Ignoti nulla cupido*. The want of knowledge of it causeth the leanness of love to it. Therefore to bring Nobles and Gentlemen into acquaintance with the Law, is a means as well to advance it, in their estimation, as to advantage them by it. *utilitatem*
2. I have long thought, that we, who are the Professors of our Law, have been more wanting to it than the Civilians and Canonists to theirs, who have written very many Volumes. *Spartium quam natus es; hanc exorna*, hath been said of old, and should be displayed anew.
3. More wanting than others before us of our own Profession have we also been as I think yet, as of old Britton, Glanvil, Bracton, besides not printed

The Preface.

printed, *Fleta* and *Ingham*, did lead the way; so since, *Master Littleton*, and, more lately, *Sir Germain Perkins*, *Fitzherbert*, *Stanford*, *Crompton*, *Lambert*, *Kitchin*, *Sir Henry Finch*, *Dalton*, have trodden this path; so as it cannot be taxed with Novelty or Singularity. I mention not Relaters or Reporters of Judgments and Resolutions, nor mere Abridgers, nor Authors of Books of Entries, expressing forms of Declarations and Pleadings; &c. because these have trodden another, (though for the Students and Professors of the Law a very profitable) path.

The tax and increpation of our late learned and judicious Sovereign upon us the Professors of the *English Law*, as being wholly in effect addicted to our own private gain and advantage, with neglect of the publick, had some strong operation upon me, howsoever upon others; setting for divers years past

4.

King James
in his Preface to his
Book against
Tobacco.

The Preface.

my pen on work, especially in Summer Vacations, upon divers particular Subjects, whereof this is one, and the first-born.

5. To this I may add the Crown's expectation of somewhat Legal to be published and set forth from time to time, as appears by the special Patents successively granted and renewed for the sole Printing of Books of Law. There is one such in force at this present, and another long hath been in Remainder and expectancy to take effect upon the expiration thereof.

6. And now to adjoyn *Sic to Hoc*, viz. the reason of my *English*-writing, to that of my writing upon a Law-theme. First, receive the said late King's judgment touching both, expressed in one of his Speeches printed. "Thus I wish, saith he, the
" Law written in our vulgar Lan-
" guage : For now it is an old mixt
" and corrupt Language, only un-
" derstood by Lawyers ; whereas
" every

March 1609

Note.

The Preface.

“every Subject ought to under-
“stand the Law under which he
“lives, &c.

Herein *Andræu Horn*, one some-
time of our Profession, agreeth with
the said late King, saying, *Abusa est*
que les Leges ouesque leur encheffons
ne soient sears & connus del tous :
It is an abuse, saith he, that the
Laws with the grounds be not
known by all. Ergo, to be in a
tongue understood by all.

7.
In his Mir-
rour of Ju-
stice.

More plainly and fully doth that
our both well-learned and well-
descended Sir *Germin* sing in con-
fort with our said late *sciencious*
King. For he first brings in the Do-
ctor of Divinity, saying that
henceforth he will take more pains
than before he had done to know
the Laws of England; for that
knowledge is *multum necessaria &*
Clericis & Laicis, imo omnibus in hoc
Regno commorantibus, etiam in foro
Conscientia. And this being in his
first Book written in *Latin*; after
writing

8.

Lib. I. c. 24.

The Preface.

writing his second Book in *English*;
he expresseth that he so did for this
reason, *viz.* To the end that it
might be understood by all.

8. Which of us hath not heard it
objected, that we the Professors of
the Law seek to hide and secret the
knowledge thereof under that
dark and distasteful Language
wherein the Law is for the most
part written? Not that I hold it any
just excuse for the nescience or
negligence of any, that our Books
are not in *English*: since, first, it
were as if for any diligent and in-
telligent man, specially if acquaint-
ed with the right *French* Language,
to understand our broken or
barbarous *French* in a few days. Se-
condly, There be both Statutes and
some other Law books in *English*,
which are neglected by the most.
Thirdly, Though care hath been
taken in Parliament in *Edward* the
third's time, that Lawyers should
plead, that is, argue and debate
Causes,

The Preface.

Causes, in *English*, which was often desired by the Nobles and Commons. till at last assented and enacted; and in Q. *Marie's* time care ^{2 & 3 Ph.} was taken, that the Commissions of ^{& Ma. c. 6.} Purveyors should be in *English*, to the end that all Subjects, from or of whom they would take, might both see them to be persons authorized, and so also in what manner they are directed to use their Authority, according to the Prince's pious and princely care, that his Subjects should not be abused by his Officers: Yet for this Affair, of having all the Law-volumes speak *English*, I have not heard nor read of any desire or endeavour in Parliament. Fourthly, if the Annals and Reports were in *English*, they are so replete with Debates about forms of Writs, Returns, Pleadings, Essoigns, Imparlanes, Protections, Vouchers, Aid-priers, and Counterpleas of both, and the like, as would easily distaste and discourage any,

The Preface.

not intending to profess and practise the Law, from versing much in them, or passing through them. This therefore as I think, would not much effect the expressed desire.

10. The thing (in my judgment) fit and fruitful to produce that good effect would be, to have Extracts of the Materials of the Law, and that not without some good choice and selection, composed in way of Discourse, or Tractate expository, and that in *English*.

11. I cannot well see or comprehend how any one Legal part or Theme may be more useful to and for the generality of men, and consequently more generally expetible and wished for, then the *Office of Executors*. For who almost is there, who either is not, or may not be an Executor or Administrator; or at least hath not, or may not have to do with them, either to receive from them, or to pay to them Debts or Legacies? Or who is there above

Forma

The Preface.

Forma pauperis, that may not be a Testator or Will-Maker, to the guidance of whom, even in the choice of his Executors and contrivance of his Will, it cannot but be material to know the Office and Duty, the Right and Interest, the Power and Authority of *Executors*; yea of each one Executor, where there be divers; yea, to know who may be made an Executor, who not; who can make one, who not; how he may be fashioned, generally or specially; what shall come to him, what cannot be given from him; yea, what Goods or Chattels shall go from him, though not given from him? Besides the knowledge for those others necessary, of the safest Wards or Locks for Executors, their *Scylla* and *Charybdis*, and the best advantage for Creditors, &c. towards or against them. To me, considering what parts of Law were most behovefull to be communicated to all willing Readers,

The Preface.

ders, none appeared which could challenge of this the precedence, and therefore I gave it the first and leading place. Thus mine own thoughts. But how far this Discourse may be profitable to any, and to how many, *aliorum sit judicium*. How many know no more of these, then of the way of a Ship upon the Sea?

12. Lastly, These are not intended for the Learned of our Profession, who have drawn, or can draw, out of the same Fountain which I did, and so need not my help ; but for their sakes who are not Professors of the Law : yet so, as if any young Students may in any part receive fruit by my Labour, I shall not grudge or repine at their so doing.
Bonum quò communius, eò melius.

The End of the Preface.

THE



THE T A B L E.

A.

- A**dministration : *where Letters of Administration may, or must be granted.* 4, 143
- Assets : *what shall be said to be Assets in the Executors hands.* 45, 92, 100, &c.
- Action : *where many Executors, in and against whom were the Action to be brought.* 47
- Administration : *what shall be said to be an Administration to determine an Execution.* 57, 58
- Account : *Executor to be bound to make a true account.* 72, 73
- Averia : *what the word means.* 82, 83
- Attachment : *what may be attached, what not.* 87
- Action : *to whom choice in Action doth belong.* 92
- Avowry : *who shall avow ; and where, when, and for what.* 95
- Assignee : *Executor the Testator's Assignee in Law, and the force thereof.* 144, 168

The Table.

Audita querela : where it will lie, and for whom, and what. 146, 190, 193, 196

Apparel to a Wife must be according to her Degree. 150

Abatement : where a Writ shall abate. 150, &c. 169

Auditors, by Statute Judges of Record. 169

Age : the several Ages of men and women, at which acts may be done or suffered, &c. 300, &c.

Assent of an Executor effectual to Remainders ; and how, where, and when. 337, &c.

Assent of an Executor absolute of what force and validity, and the like of an Assent conditional. 340, 341

Administrators, in effect, the same with Executors. 370

B

Bona notabilia : what shall be so called, and the value thereof, and how they cause a Will to be severally proved, &c. 64, &c.

Burial of the dead necessary, and why. 186, 187

Bequests personal, how they may be lost, forfeited, or revoked. 345, &c.

Bequests : what will pass under the name of Bequests, 359, &c.

C.

Codicil, annexed to a Will formerly revoked, reviveth the same. 35

Creditor made Executor may pay himself first. 46

Chattels real possessory : what shall be taken to be such, what not. 74, &c.

Chattels personal : what shall be and be accounted such, and what not. 79, &c. Capias.

The Table.

<i>Capias. No Capias against an Executor's body for the Testator's Debt.</i>	126
<i>Costs. Executor to pay no Costs, where and when.</i>	148
<i>Contract. Debts by Contract when and how to be paid by Executors.</i>	171, &c.
<i>Covenant. Where an Action of Covenant will lie against an Executor, and where not.</i>	177, &c.
<i>Where an Executor is chargeable by Covenant, and where not.</i>	179, &c.
<i>Conscience. What an Executor is bound to do as matter of Conscience.</i>	371, 372.

D.

<i>Devise. What may be devised by Will, and what not, and by whom.</i>	25, &c. 33, 36
<i>Debts bequeathed by Will must be sued in the Executor's name.</i>	26
<i>Debts how and when to be paid by the Executor, and their kinds.</i>	39, 167, &c.
<i>How a Debt may be forgiven by Will, and how not, and how extinguished.</i>	43, &c.
<i>Debtor. Executor is no Debtor, but a Detainer only, and as such must ever be sued.</i>	125, 210
<i>Damage feasant : what shall be so adjudged and taken, and by whom.</i>	133
<i>Default of one Executor shall not be a total Default to all.</i>	141
<i>Debt. Action of Debt, what sufficient thereto, and what not.</i>	167
<i>Demand. What shall be a good Demand, and what not.</i>	206, 207
	Distress,

The Table.

Distress, <i>where, and how, and of what, and the effect thereof.</i>	217, &c.
Disability, <i>Where an Executor shall be disabled to assent.</i>	325, 326
Devisee for life, <i>how, where, and when he may frustrate his Remainder in a term.</i>	343, 344
E.	
Executor, <i>how relating to a Will.</i>	3, 4, 7, 11
His Definition.	3
How and where liable to pay his Testator's Debts, and why, and where not.	6, 7, 8, 154, 155, 162, 164, 184, 185
His Duty.	8, 225
What words make an Executor, what not.	12, 13
After what manner, such may be made, and how they may be limited.	14
Executors conditional, who.	15, 16
How their powers may be divided.	17, 18, 19
Who may make and be Executors, and who not.	21, &c. 44
Excommunicate person cannot sue.	24
Executorship may be revoked, and how.	32, 33, 37
Executor may pay what Creditor he will first, notwithstanding legal order.	46, 205, &c.
Where all the Executors are to be named, and where not.	59, 60, 136, &c. 150
Where an Executor may pay himself, and how, and with what.	113, 114, 204, 205
Executors, though never so many, shall have but one Essoign.	137
	Estovers

The Table.

Estovers to be enjoyed by an Executor though not named, where, and how.	147, 148
Where an Executor shall be excused from payment, and why.	162, &c.
Where an Executor's own goods shall be liable, though no Waste.	276, &c. 321
Executor bound by his own Assent to a Legatee.	323, &c. 341
Executor of an Executor his power & duty.	368, 369

F.

Fee-simple: Lands in Fee-simple devisable by Will, and how.	5
Fees upon Probate and Copies of Wills, and Inventories.	71, 188, 189
Funeral-charges, what shall be allowed for the same.	187, 188, 249, 250
Fee-farm Rents, how and when payable to Sheriffs.	194
Feme-Covert: where a Woman-Covert may make a Will, and how.	282, &c.
Whether such may be made Executors without their Husbands consent, and what they can do if he consent.	291, &c.
Fee simple cannot afford Remainder, how, where, and why	333

G.

Goods: what Interest an Executor hath in his Testator's Goods; and how it differs from proper and absolute Interest.	122, &c.
Where a Testator's Goods are purloyned or imbezilled	

The Table.

killed by strangers or others, what remedy to recover them, and when, and where.

157, &c.

H.

Heir, where chargeable by Bonds, and where not. 48
What shall go to the Heir, to the Executor, and what may be done by either of them to recover their right. 73, 76, 81, 86, &c. 97, 99, 132, &c.

Husband and Wife Executor, the Wife cannot answer without her Husband.

140, 321

I.

Intestate. Where a man shall be said to die intestate, though he make a Will in writing. 5, 15, 19, 290

Inventory how to be made, before whom, and of what.

72

Judgment. Where Administrator cannot have Execution of a former Judgment, and why.

148,

149

Judgments where, and how to be paid by Executors, and why.

195, &c.

A latter Judgment to be preferred before a precedent Statute.

196

Upon Judgments in inferiour Courts, how, where, and when Execution may be had into any Court of England.

199

Infant : how, where, and when an Infant may make a Will, and how not.

305, 306

When and where an Infant may be made an Executor, and where not.

307, &c.

K.

No Suit against the King.

65

Only

The Table.

Only for the King an Action of Account against Executors. 177

Debts to the King of Records are to be first paid by Executors, and what are not Debts to the King of Record. 190, &c.

L.

Land how to be settled in a man's life, that it pass not by Will : so also of Leases. 27, 28

Legatee, when and how to recover his Legacy, and where to sue for the same. 39, &c. 318

How a Legacy may be disposed by the Legatee, and where, and when. 40, 316, 317

Lease. What a Lessee may remove, and what not. 86, 87

Law. Where an Executor shall not be admitted to wage his Law. 145

Where a Testator might wage his Law, Executor not chargeable. 169, &c.

Lease. Where an Executor may waive a Lease, and where not. 171, 172, 211, 215

Legacy, how, where, and when recoverable by the Law. 318

How a Legacy may be revoked. 350, &c.

Lease. When and where a Lease shall be void. 332

M.

Medietas Linguae. Where a Tryal per medietat. ling. is allowable, and where not. 149, 299

N.

Ne unques Executor, a good Plea. 61

Nobleman being Executor shall pay Costs upon a Non-suit. 149. Over-

The Table.

O.

Overseer of a Will, his power and duty. 13, 14.

Outlary, what forfeited thereby, and what is not. 132. 23

Executor out-lawed doth not forfeit his Testator's Goods, and why. 122, 152

P.

Proviso repugnant void. 20

Probate. What an Executor may do before the Will proved, and what not. 48, &c.

Where an Executor may be sued before the Probate of the Will; and where the same must be shewed, and where not. 51, 52

Before whom Probate of a Will is to be made. 62,

63, 68

Probate erroneous, where utterly void, and where not. 67, 68

What shall be said to be a good Probate, and the validity thereof. 69

Probate and Refusal, their relation. 70

Property. Where the Property of the Testator's Goods shall be turned to the Executor as his own. 127, &c.

147

Possession of one Executor is the possession of all, where, and when. 142, 143

When and where an Executor shall be said to have a Possession to make him liable to pay Debts and Legacies. 154, &c.

Plea. What shall be a good Plea for an Executor; and what not. 210, 216, 221, 245, 248, 257

Promises

The Table.

Promises made by the Testator, how and where to be considered, as to satisfaction by the Executor.

223, 224

Proclamation not to be made without Warrant from the King.

231

Plea. What shall be a good, and what a prejudicial Plea to Executors.

263, &c.

R..

Revocation of a Will, how to be performed, so as to make it null.

29, &c.

Refusal to prove a Will, how it may or must be.

53, 54

Where an Executor shall not be admitted to Refusal, and why.

55, &c.

Refusal, how far it worketh, and for and against whom, and the force thereof.

59, 60

Replevin, where, and in what it will not lie.

82, 94

Release. One Executor cannot release his Interest to the other; one is the Release of all.

141, 142,

151, 321

Record. Debts by Record, when, and how to be paid by Executors.

169, 170

Recognizances, how and when to be satisfied by Executors

200, &c.

Rent due at the Testator's death, how and when to be paid by the Executor.

209, &c.

Release: when and how good by and from an Infant; and where not, and why.

309, &c.

Remainder upon Leases for years of what validity in Law.

326, 327, 333.

Who

The Table.

<i>Who shall enjoy such a Remainder.</i>	328, &c.
<i>What shall be said a possibility of Remainder, and what Interest grows thereby.</i>	341, &c.
<i>Relation: what it is.</i>	355
<i>How the same is useful.</i>	356, &c.

S.

<i>Seal. A Seal not necessary to a Will.</i>	43
<i>Severance. Where Executors sue, such as will not prosecute must be severed.</i>	140
<i>Scire facias: where not sufficient for an Executor, and where it is.</i>	146, 147
<i>Statute, how to be sued to Extent by an Executor.</i>	149
<i>Specialty. What shall be adjudged a good Debt by Specialty.</i>	167
<i>Debt by Specialty, where to be paid by an Executor.</i>	166, 167, 168, 204
<i>Scire facias: where necessary, and where not.</i>	200, 201, 275
<i>Statutes, how and when to be satisfied by Executors.</i>	200, &c.
<i>Socage. Guardian in Socage how long to continue.</i>	303

T.

<i>Testator. What shall be said to be a Testator's Goods, and what not.</i>	72
<i>Trespass. Where an Action of Trespass will lie, and where not, and for whom.</i>	94, 95, 96, 100
<i>Trespass. Executor not liable for his Testator's wrong, how, and where; and how, and where he is.</i>	182, &c.
<i>Tithes: of what payable, and of what not.</i>	97
	Trover

The Table.

Trover and Conversion, where such an Action is maintainable by an Executor. 98

U.

Vastavit. Where the Sheriff may return a Vastavit, and where not. 241, &c.

W.

Will, how relating to an Executor. 3, 4:

What shall be judged a good Will. 4, 5, 6, 10

Wills of two sorts, and which is the best. 9, 10

Will Nuncupative how to be made. 11

Two Wills where and when to be proved. 19

What and how many persons may not make a Will, and who may. 20, 21, 22, 24

How a Will, once revoked, may again be revived. 35, 36

Waste. Who shall have an Action in Waste, and where, and when. 93, 234, 235, 237, 238

Waste. When, how, and where an Executor shall be said to commit Waste, and where not. 226, &c.

Who shall be suable for such Waste, and how, and where. 231, &c.

Out of what such Waste shall be satisfied, and the remedy to attain the same. 236, &c.

Warranty general, though by implied Covenant in every Demise, yet qualified by Covenant in words. 181

Wrong. Who is, and shall be said, an Executor of his own wrong. 246, &c.

How far such becomes liable, and how, and to whom. 257, 258

How

The Table:

How such a one shall be sued, and by what name.

254, &c.

What shall be said to be well done by him. 259, &c.

Maxims.

Q uod necessario subintelligitur, non deest.	7
Frustrà sit per plura quod fieri potest per pauciora.	ibid.
Factum valet quod fieri non debuit.	56
Quicquid plantatur solo, solo cedit.	83
Sol sine homine generat herbam.	98
Pro possessore habetur qui dolo desiit possidere.	160
Actio personalis moritur cum persona.	182
Proximus quisq; sibi.	204
In equali jure melior est conditio possidentis.	ibid.
De minimis non curat Lex.	213
Ignorantia Juris non excusat.	215
Potestas Regis juris est, non injuriæ: nam potestas injuriæ non est Dei, sed Diaboli.	222
Qui timent cavent, & vitant.	231
Frustrà est inutilis potentia.	289
Volenti non fit injuria.	299
Non est regula quin fallat.	302
Quando duo Jura concurrant in una persona, æquum est ut si essent in diversis.	319
Nibil tam consentaneum est equitati naturali, quàm unumquodq; dissolvi eodem modo quo conficitur.	353.

THE
OFFICE
OF AN
Executor.

THE INTRODUCTION.



He things considerable touching Executors may all, in effect, be reduced to these three Heads; viz.

1. Their *Being*.
2. Their *Having*.
3. Their *Doing*.

By the first I intend their Creation or Constitution, with the incidents there-

B

to

The Office of

to. By the second, their Interest, Fruition, or Possession. By the third, their Managing and execution of their Office. This last was and is the thing principally in my intention, and the chief aim of this Discourse; but necessarily it must have some *Ingredients*, some *Concomitants*, and some *Consequents*: as he that travelleth from *London* to *York* to speak with *J S*, must needs pass by and through other Towns and Villages, and speak with divers other persons in his Journey and Return. To come first to the first; therein we will consider these six things.

C H A P. I.

1. *Whether an Executor and a Will be such Relatives, that one cannot be without the other; and therein of the several kinds of Wills.*
2. *How, and in what words an Executor may be made and created.*
3. *How he may be in special manner, different from the general, fashioned, limited, or qualified.*
4. *Who may make, or be made an Executor, who not.*
5. *What*

an Executor.

5. What one may give or bequeath by Will, what not.
6. How a Will or Executor once made may be unmade; and what shall amount thereto, viz. a Revocation total or partial; what to new publication.

Of the Relation between a Will and an Executor.

AS to the first; the very name of Executor purporteth in general one to execute somewhat, or to whom the execution of somewhat is committed or recommended. In one particular therefore an Executor of a Will must needs be such a one to whom the execution and performance of another man's Will after his death is commended or committed; or who is constituted or authorized by the Will-maker to do him that friendly office. Hence it followeth necessarily, that a Will is the only Bed where an Executor can be begotten or conceived; for where no Will is, there can be no Executor: and this is so conspicuous and evident to every low capacity, that it needs no proof.

or illustration. On the other side, though much may be written in the name of a Will, many Legacies bequeathed, and many things appointed to be done, yet if no executor be named, there is no Will:

Flow. Com.
185. in *Wood*
and *Darcie's*
Case, so ex-
pressly said.

for these two be so relative and reciprocal, as that one cannot be without the other; if no Will, no Executor; if no

Executor, no Will. Yet here are two Cautions to be affixed: 1. That a man's

Testamen-
tum, quasi
testatio men-
tis.

Mind, Will and Intent touching the disposition of his Goods being declared, although for want of naming an Executor he die intestate, so as Administration is to be committed; yet for that here is not only an inchoation or inception of a Testament, but so far a progression therein as *testatio mentis*, that is, the manifestation of the mind of the party deceased, and owner of Goods; therefore this mind and intention of the Intestate being notified and made known to the Judge, who is to commit Administration, is usually annexed (as I take it) to the Letters of Administration; and meet so to be, for a direction for and to the Administrator, as well as to the Will fully and perfectly made, but refused to be proved by the Executor, which is usual.

Another

Another Caution is; Where a man seised of Land in Fee-simple disposeth the same, or part thereof, by his Will in writing, this standeth good for the whole or part, according to the difference of the Tenure, although no Executor be named: so as the party dieth intestate, & Administration is to be committed, as touching his Goods; & yet hath a Will, as touching his Lands. This may seem strange: but the reason thereof is an Act of Parliament, inabling to dispose of Land by Will in writing; & for that, Land is not properly Testamentary; neither hath the Executor (if any be) any thing to do or intermeddle therewith: and therefore is the making or not making of an Executor, nothing pertinent to the validity or invalidity of this devise or disposition of Lands by Will. So as, though where there is not *Testatio mentis*, there is not *Testamentum*; yet may there be the first without the latter. Having now seen that Bequests of Legacies, without making of Executors, doth not amount to a Will: let us now consider whether the sole making of Executors, in the name of a Will, without giving any Legacy, or appointing any thing to be done by Executors,

*Sum, Silu.
fol. 32. b.*

whether, I say, this be or amount unto a Will or not; since here, upon the matter, nothing is willed, and consequently nothing rests to be executed by the Executors, whose office is, as hath been said, to execute the mind, will and intent of their Testator; and, *Ubi non est testatio mentis, non est Testamentum*, say the Canonists. For answer hereunto, confessing that indeed to be the office of an Executor, I yet conceive confidently, that in the case above put there is a good Will, and as a Will it is to be proved, and approved, for these Reasons. First, for that the main and principal part of an Executor's office, and that which concerns the soul of a Testator, (as our Books speak) is the payment of his Debts: now who knows not that the very making of an Executor is the constituting of such a person who is to pay all Debts? and for that cause and end is principally to have and enjoy all the Goods and Chattels of the Testators, and all sums of money to him owing. So as the naming of *A* and *B* Executors, is by implication a gift or donation unto them of all the goods and chattels, credits and personal estate of the Testator, and the laying upon them

an

an Obligation to pay all his Debts, and making them subject to every man's Action for the same. And if the Law speak thus much, since *Quod necessario subintelligitur non deest*, what need then the party express it in his Will? If he had willed more than this, as to have given this or that in way of Legacy, it had been needful for him so to have set down in his Will; but there is no meer necessity that every man should give Legacies in his Will: the Estates of many will not do more than pay their Debts, nor oftentimes do so much; so as if they should give any Legacies, it must be a dead and a void gift. And suppose a man hath much more, and intendeth all to his Wife, Brother, or Sister, or other Friend, his Debts being by such persons paid; since the very making of the party Executor without any more amounteth to thus much, and effecteth this, what needeth then more words; *Frustra fit per plura quod fieri potest per pauciora*; as we often speak touching Legal passages, It is needless to write four lines, where two be sufficient. Nor is *testatio mentis* here wanting, since the Testator hath made known who shall have the

The Office of

Administration of his goods for payment of his Debts : and it is to be presumed he had no more special Will, since he did not declare more, and left his Executors farther to have and to do *prout Lex postulat*. And who can say here is nothing to execute? Is the suing for and collecting of Debts due to the Testator, and paying of Debts by him, nothing? Nay, it is, *in hoc negotio*, the *unum necessarium*. Besides, the making of an Executor is a designment of a person to be the Testator's Assign, to whom and by whom divers things may be feasible, by virtue of Covenants, Bonds, or other Assurances; as after, where we come to shew how the Executor represents the person of the Testator, will appear: also of one who, as our Books often speak, is to dispose the Testator's goods for the best advantage of his Soul; but instead of that, (since as the Tree falleth, so will it lie or rest) I will say, as is most for the honour and reputation of the Testator.

Of the kinds of Wills.

NOW Wills are of two kinds, or may be two wayes made, viz. either by writing, or nuncupative, that is, by words not put in writing during the Testator's life; for after the Testator's death this verbal Will must be reduced to writing, and have the Seal of the Ordinary, or Judge Spiritual, thereto affixed: and then it is as effectual, and of as good validity, as if it had been in writing in the Testator's life-time; and so doth the Common Law allow and approve thereof.

^{4 Hen. 6. 10.}

^{E. 4. 1.}

If it be written, and brought to and approved by the Testator in his life, it is a Will in writing.

^{14 H. 6. 5.}

^{Vide 5 H. 5.}

^{1. M. 15. and}

^{16 Eliz.}

But I advise all to make Wills by writing, & not to leave them to the doubtful fidelity or slippery memory of Witnesses. For as of Leases parol hath been said, that they be Leases perjured, or of perjury; so of Wills parol may be feared. Besides, many times a man doth speak & declare this or that part of his Will, which his wife, child, or friend dissuading, he letteth that purpose & part of his Will to fall, and departs from it: yet Witnesses, wishing it to stand, will perhaps affirm it as part of the Will. As for a Will-gift, and disposition of Land of inheritance, if it be not fully written

written before the death of the Testator, or done so far (at least) as concerns the disposition of Lands, it cannot be for that part made good by reducing it to writing after his death. As for Goods and Chattels, it may. Yet if it be written before the death of the Testator, if it be never brought to him, or read to him after the writing thereof, it is good enough; and that not only for Land, as the Case resolved in King *Edw. 6.* his time was, but also for Goods and Chattels, so as there be an Executor named. But whether shall we say this is a Will nuncupative, or in writing? And surely, I think that this is a Will in Writing, and not only verbal, though it want subscribing: for we know that many cannot write their names, but only marks, and what is that? Nay, suppose one wants hands, and cannot write so much as his name, yet doubtless this man may make a Will in writing, it being written by his direction, as his Will which he dictated: nor is the subscribing of the name of the maker any essential part of a Deed, and less of a Will, which needs not sealing, as a Deed doth. Now put we the case, on the other side, that many Bequests or Legacies be
named

6 Ed. 6. Dy.
32.

named in a Will, and many things expressed to be done, and no Executor is named in the Writing, only by word of mouth *A* and *B* be named Executors: This I think confidently is no Will in Writing, but nuncupative only; for that one essential part of the Will, viz. making of Executors, is wanting in the writing. Nay, the appointing of him Executor who is named in a Note left with *A B*, is no sufficient making of an Executor; saith the *Summist*. And of such nuncupative Wills *Mr. Perkins* reasonably saith, that it properly hath place when one, suddenly taken with sickness violent, dares not stay the writing of his Will, for fear of prevention by death; and therefore prays his Curate and others to witness what his Will is. To this Will not written there must be seven Witnesses, and such as come not by chance, but are especially called for that purpose, saith the *Summist*.

Tit. de Test. Sum. Silu. f. 443. b.
If he survive and live a long time, not causing it to be writ or attested by Witnesses, methinks it should not stand as his Will.
Id. supra, fo. 444. b.

What shall amount to a making one Executor, or what words are requisite thereunto.

HAVING before made to appear, that the being of an Executor is an essential

sential part of a Will, and so *de esse*, and not *de bene esse* only, of a Will and Testament: let us now see, first, by what words an Executor may be made; secondly, *de modo*, in what manner it may be done, how the power and authority of Executors may be limited and divided. As to the first, though one do expressly by Will name or appoint any to be Executor; yet if by any word or circumlocution he recommend or commit to one or more the charge and office which pertaineth to an Executor, it amounteth to as much as the ordaining or constituting of him or them to be Executors: As if he declare by his Will that *A B* shall have his Goods after his death, to pay his Debts, and otherwise to dispose at his pleasure, or to that effect; by this is *A B* made Executor, as was conceived by the Judges in the late Queen's time: And long before that it was held, That if one do will only that *A B* shall have the Administration of Goods, he is thereby made Executor, yea, in the said late Queen's time, one giving divers Legacies, and then appointing that, his Debts and Legacies being paid, his Wife should have the residue of his Goods, so that she put

If *A B* be made Executor, and to him and *D* some goods are devised to be disposed for his Soul, *D* is by this an Executor for these.

39 H. 6. Dy.

er 190.

M. 15 & 16

E 12,

21 H. 6. 6, 7.

put in security for the performance of his Will: by this, without more, was she an Executor, as was held by three Justices, (*viz.*) *Manwood*, *Harper* and *Mounson*, in the Lord *Dyer's* absence. And so also where an Infant was made Executor, and *A* and *B* Overseers, with this condition, That they should have the rule and disposition of his Goods, and payment and receipt of Debts, unto the full age of the Infant; by this were they held to be Executors in the mean time. And if *A* be made Executor, and the Testator after in his Will expresseth that *B* shall Administer also with him, and in aid of him; here *B* is an Executor as well as *A*, and if *A* refuse, *B* alone may prove the Will as Executor, notwithstanding it be only said, he shall Administer with *A*, and in aid of him. Thus many ways, and by divers words of implication, one may be made Executor, although not expressly so named by the Will. But if *A* be made an Executor, and *B* a Co-adjutor, without more, he is not by this an Executor with *A*, as in *K.H.6.* his time was held: nor hath such Co-adjutor or Overseer any power to Administer, or intermeddle otherwise than to counsel, perswade, and advise;

yet

21 H. 6. 6. yet I think he may, and in Conscience
 24 Ed. 3. should so do. And if that will not pre-
 F. Exec. 121. vail to rectifie negligence or miscarry-
 29 Ed. 3. 39. ings in Executors, he shall well perform
 the trust reposed in him, if he complain
 in the Spiritual Court, or Court of Con-
 science: and it is reason, I think, that
 so doing upon just cause, his charges be
 born out of the Testator's estate, or the
 Executor's purse, who otherwise would
 not be reformed.

*How an Executor, or his Executorship, may
 be limited or qualified in special manner,
 different from the general.*

NOW let us see how this making of
 an Executor may be specially qual-
 ified. And first, the time may be limited
 when he shall first begin to be Executor;
 and that either certainly, or with some
 contingency. Secondly, the creation
 may be conditional. Thirdly, it may
 be partial, or dividedly, and not in-
 tirely.

As to the first, one may appoint
 J S to be his Executor a year or more
 time after his death; this is good. So
 also

also if *A* appoint *B* his Son to be his Executor when he shall come to full age, and in the mean time he dieth intestate. *Vide* Grof-
 Again, one may appoint the Executor of *A* to be his Executor: and then if he *brook & Fox. Plowd.*
 die before *A*, he is Intestate until *A* die. *A* and *B*
 This creation may also be conditional, made Executors, but
 and the condition may either be precedent or subsequent. In the time of King *not B to intermeddle during the life of A; and good.*
H. 6. one did name *A* and *B* his Executors, and if they would not take it upon them, then *C* and *D* should be his Executors, and then there *A* and *B* refused, *32 H. 8. Bre. 155. 3 H. 6. fo. 6.*
 and the question was, whether in Suit against the Debtors of the Testator, *A* and *B* should joyn with *C* and *D*; as where four Executors be named, and two refuse, and the other two prove the Will, yet all four must be named in Suit against the Testator's Debtors, as was there admitted: but in the principal Case it was resolved, That the Suit should be only in the name of *C* and *D*, for that the appointment of them Executors if *A* and *B* did refuse, did imply that then they only should be Executors; and here all four were never made, nor intended to be Executors, but *A* and *B*, upon a condition subsequent

sequent, that they should not refuse; and *C* and *D*, upon a condition precedent, *viz.* if *A* and *B* did refuse. It is usual to make one or more Executors conditionally, that they put in security to pay Legacies, or, in general, to perform the Will; nor was it ever doubted, as I think, but that this was good: yet I should advise that such Condition be plainly thus expressed, *viz.* either thus, that if *J S* do put in security, &c. by such a day, then he shall be Executor, else not; or thus, *viz.* to make him Executor conditionally, that before he do Administer (Funeral perhaps excepted) he shall put in such security; else, perhaps, he being Executor till the Condition broken, in that mean time he may have disposed of all or most part of the Testator's estate. In the late Queen's time there was a Case remarkable to this purpose: One Willed, that if his Wife suffered *J S* to enjoy *Black-Acre* (being belike part of a Joynture) for three years, then she should be his Executor, or else *A B* should: and the question was in the *Common Pleas*, Whether presently, before the end of the three years, she were Executor; or not till she suffered the

P. 33 Eliz.
Alice Francis
 in her Case.

the Land to be enjoyed three years ; and it was held by all the Judges but the Lord *Anderson*, that she was presently Executor, until she should disturb *I S, &c.* For upon that done, it was agreed that the Executorship would by virtue of the Condition be transferred from the Wife to *A B*. But now during these three years might she have disposed of all the Goods of her Husband, yea, within one of these three years, and less time, and then have broken the Condition, and have left to *A B* a dry Executorship.

Now to the third Point, one may divide his Executor's power three ways, ^{19 H. 8. 3.} ^{19 H. 8. Dy.} ^{4 H. 1. 33} *viz.* Really, Locally, or Temporally. ^{Eliz. in com. van.}

Really thus: He may make *A* his Executor for his Plate and Household-stuff, *B* for his Sheep and Cattel, *C* for his Leases and States by extent, *D* for his Debts due unto him; and so divide the Power and Administration of his Executors at his pleasure. He may divide them also or their power Locally: *viz.* *A* for ^{32 H. 8. Brod} his Goods in *Com. Buck.* ^{115.} *B* for those in *Com. Oxon.* and *C* for those in *Com. Berks.*

He may also divide them in Time: *viz.* his Wife or any other person to be Executor during her life, or during the mi-

C nurity

nority of his Son, or so long as she continues Widow, and after his Son to be Executor. So of like limitations or divisions, either for time, place, or things, wherewith they shall intermeddle. Nay doubtless, one may be made Executor for one particular thing only, as touching such a Statute, or Bond, and no more; and thereof good use may be made, as I think, thus. Many have Bonds, Statutes and Recognizances, for warranty or enjoying of Land, or freeing or saving themselves from incumbrances, in general or particular. Now he which hath these, selling the Land, may by Letter of Attorney lawfully assign them to the party who buyeth the Land or Lease: but this notwithstanding, the interest remains in him who selleth, and by his Outlawry they may be forfeited, or by him released, any Bond to the contrary notwithstanding; and if he die, the interest in Law will be in and go to his Executors, and in their names only Suit or Execution may be had and maintained.

Quer. If not
Assets in
Law, when
obtained.

Now then if the Vendor, besides assignment, make, as to the Statute, Recognizance, or Obligation, only the Vendee Executor: by this the interest, after death

death of the party, will be in him actually and really to his more safety, since none but he can release or discharge, nor any other name need to be used to sue, or take benefit thereof. But *Quer.* if the Verdee, his Heirs and Assigns, may be made Executors, so as that security shall go to them one after another, without renewed making of Executors? Thus if the party make no other Executor, he dieth Intestate as to the rest of his estate; and as to this specialty only shall have an Executor, and must have a Will proved: And in case he do make another Will for his estate residue, there must be two Wills proved. But in the other case, where by one only Will one is Executor for one part of the estate, and another for another, there being but one Will to be proved, one proving of it sufficeth. And though in the premisses of a Will two be made Executors joyntly and equally; yet there may be a *Proviso*, that one shall not meddle during the others life, so as they shall be Executors successively, and not joyntly. And thus also to other purposes aforesaid, a subsequent Clause or *Proviso* may make the partition and division of authority. But if the *Proviso* or

32 H. 8.
Bro. Exec.
55.

19 H.8. Dyer
304

clause subsequent be meerly contrary to the premisses, it will be void: as where two were made Executors with a *Proviso* or Clause, that one of them should not Administer his Goods; this was held void for repugnancy by *Brndenel* and *Englefield* Justices. But *Fitzherbert* Justice was of mind that it was not void, nor utterly repugnant: for the other might joyn in Suits, though not administer. And Justice *Shelly* was of a third opinion different from all the rest, viz. That here was a repugnancy, but the last Clause should controll the Premisses: and so this one only should be Executor.

Who may make an Executor.

SOME persons may be unable to make Wills, and consequently Executors, for that is all one: whosoever may make a Will, may make an Executor. There be nineteen several kinds of persons unable, as the *Canonists* say, to make Wills: but with many of them we will not intermeddle, because we find no mention of them in our Law. The persons principally & most usefully to be consider'd of by us are either the defective in understanding,
as

as Infants, Idiots, Lunaticks, and the like; or defective in power or Interest, as women covert or married, persons outlawed, attainted, convict, or excommunicate. Some touch we will give of others; as Aliens, Corporations, Villains, Monks and Friars. As for Infants and women covert, because much is to be said of each of them and their Administration, we will forbear to treat of them in this place, but after will do it of each severally.

To begin with an Idiot; naturally he is not able to make a Will, as was resolved ^{3 Eliz. Dyer} in the Spiritual Court, because he wants ^{203, 204.} the use of Reason to conceive what it is fit for him to will: nor doth the Common Law oppose this, as I think.

A Lunatick, having *Lucida intervalla*, that is, some seasons of enjoying his right mind, and freedom from his Lunacy, may in those times of his right mind make a Will and Executors else not; for even one by age or sickness become of *non sane memorie* is unable to dispose of Lands or Goods.

One deaf and dumb born may make a ^{*Vide plus in*} Grant, saith Mr. *Perk.* If he hath under- ^{*Perk. 5, 6.*} standing, which is hard, as he confesseth, consequently much more a Will; ^{*33 H.8. Dyer 55, 56.*} ^{*Vide 26 Ed.*} ^{*363. Lib.*}

18 Ed. 5. 53.

26 Ed. 3. 63.

So in effect

44 Aff. p. 30.

P. 31 E. 12.

Pascatia de

Fountains

Case.

but in the time of King Hen: 1. it is left a Demurrer, whether a Deed by such be good or not. If but mute, he may wage his Law, and atturn by signs, and so perhaps by signs declare his Will, 44. Aff. p. 36.

An Alien may make or be an Executor, so as he be not an Alien enemy, for such cannot sue, as in the late Queens time was held: but there the doubt was, whether a Subject of *Spain* were at that time to be held an enemy, no war being proclaimed between the Kingdoms, though hostility exercised.

As for persons Attainted, Convicted, or Outlawed, it will be said, that these can have no Goods of their own, and consequently they can make no Wills, nor Executors; and it is not to be denied, that we find it pleaded sometimes by Executors, that their Testators stood out-lawed. But first it is clear, that all and every of these may have Goods as Executors to others, which neither are forfeited by Attainder or Out-lawry, nor devested by marriage or Villainage. Therefore, as touching them, they may make Testaments. And that all these sorts of persons may be Executors, is also evident.

So

So also touching Villains, Monks, and Friars, who can have no goods to their own uses. And that one attainted of Felony may have an Executor, appears by the Case in the late Queens time wherein it was long debated, Whether such an Executor might maintain a Writ of Error, or not, to reverse the Attainder of the Testator. And as for other Out-lawries, the Plea thereof by the Executors, that their Testator was and died out-lawed, proves not a nullity of the Will, or Executorship; for then they might have pleaded, that they were never Executors. But it tends to this, that no goods did or could come to them for satisfaction of the Debts, by reason of Out-lawry; yet it hath been delivered, not of old only in many Books, but by some of late, that Debts upon Contract, where the Defendent may wage his Law, are not forfeited by Out-lawry, nor uncertain Damages for trespass in Battery, or false Imprisonment, &c. *Quer. of* breach of Covenant. But goods taken away by a Trespasser, may yet be forfeited by the Attainder or Out-lawry of him from whom they are taken; for that the property in right still appertain-

29. Aff. p. 63.
49 Ed. 3. 5.
50 Aff. p. 15.
33 H. 6. 27.
9 Eliz. D.
26. 2. Contra,
Co. lib. 4.
fol. 95.
19 H. 6. 47.
30 Ed. 3. 4.
16 Ed. 4. 7.
5 Ed. 3. 53.
6 H. 7.

ed to him, and he might have taken them again wheresoever he found them: therefore the Action for this shall not come to his Executor, but for the other not forfeited it may.

15 H. 7. fo. 7. Whether an Excommunicated person be able to make a Will or not, may be some doubt, since *Keble* denieth him ability to present to a Church; and in the very point anciently the opinion of *Canonists* hath been negative, but more lately grew affirmative.

*Summ. Sylv.
iii. Testam.*

Who may be Executor, more.

42 E. 3. 1.

AN Excommunicate person cannot sue, that is, proceed in Suit as Executor, till he be absolved, there being danger of Excommunication to all that converse with him; but this makes not a nullity of his Executorship, nor overthrows the Suit, but stays it only from proceeding until Absolution. As for persons attainted or outlawed, we have before spoken affirmatively in way of proof that they may make Executors, for continuation of the Executorship; so of Aliens and others before. Recusants convicted at the time of the death of any Testator

21 H. 6. 30.

A Clark attainted may be an Executor by-past.

Just.

Pascat. de

Countain.

But an Alien Enemy

cannot sue

as Executor,

P. 31 Eliz.

3 Jac. cap 5.

Testator are disabled to be his Executors.

Whether Corporations compound, or consisting of divers persons, may be made Executors or not, I doubt. First, because they cannot be Feoffees in trust to others use. Secondly, they are a body framed for a special purpose. Thirdly, they cannot come to prove a Will, or at least to take an Oath as others do.

What a man may give or dispose by his Will.

HAVING considered of the makers of Executors by Will, and of them so made; let us now consider what by this Will may be disposed, given or bequeathed. And first, he who himself is an Executor cannot by his Will give or bequeath to any other the Goods, Chattels, or Credits he hath as Executor, the property not being altered; for that he hath not them properly as his own or to his own use: only he may make a continuation of the Executorship, and his Executor shall have them as Executor to the first Testator, as was resolved by the Judges of both Benches in the late Queen's time. And if he be Administrator, the Bequest is then also void, nor then

*Bransby.
vers. Gran-
tham. Plow-
den. f. 525.*

*Hil. 20
Eliz.*

At any time
in his life he
may alter
the proper-
ty.

So 48 E. 3.
fol. 14, 15.
Where the
Bequest was
to one of the
Executors, it
was held,
that the o-
ther Execu-
tor might
release it.
If sufficient,
otherwise to
pay all one
as if none.
48 E. 3. p. 14,
15,
11 Ed. 3.
Fitz. Tit.
Cond. 9.
where both
stated joint-
ly by one
Grant.
Differences
between
joyn't Te-
nants and
Tenants in
common,
holding by
several
Grants.

then will they go to his Executor, but to a new Administrator; but on his Death-bed he may give them by Word or Deed, though not by Will. Next, if a man have Debts owing to him, as many have much, it is considerable, whether by way of Bequest in his Will he can give away these to any from his Executors. And doubtless he cannot effectually in Law; they being not subject to Assignment unto any, except the King. So as if he give such a Debt to A, and such to B, yet must the Suit for them be in the name of the Executor; and so also the Release or Acquittance for them; and not in their names to whom the Bequest is. But when they be received, if there be no Debts to pay, the Executor ought to deliver them to the party to whom the Bequest is, and thereunto may be compelled in Court of Conscience, or in the Spiritual Court. Therefore the Case of the bequeathing money payable upon a Mortgage is in this manner to be understood to be good, and not otherwise, as I take it. He that is joyn'tly with any other estated in Lands or Goods, can give no part by his Will, but all will survive: but by Act in his life he may dispose

dispose of his part ; and the Assignee may dispose of his moiety by Will, yea, though it be half an Horse or Oxe, that cannot be divided. So of a Lease of Lands, or Tithes, or Grant of Goods to two, *Habendum*, one moiety to the one, and the other moiety to the other ; each may give his moiety by Will. But if one be possessed or estated for years, by Lease, Wardship, or Extent, &c. in the right of his Wife, or have the next avoidance of a Church in her right, he cannot by Will give or bequeath any of these ; but, notwithstanding, they will remain unto his Wife, upon his death ; but yet his Gift or Grant of them taking effect in his life-time would bind his wife, and carry away his interest from her. If one be Tenant for the lives of one or more others, (as oft-times men take Leases for lives of younger persons than themselves) this cannot be by Will disposed of ; for that it is no Chattel, nor is it within the Statutes of Wills, for that is no state of Inheritance. Therefore let the party look to convey it in his life-time, lest it go to an Occupant, *viz.* him who first shall enter. If it be an estate in Land, he must either make Livery, have a Bargain and

Another
kind of Te-
nants in
common.

and Sale enrolled, or Covenant to stand seized to the use of his Wife, or some of his blood, or make a Lease for years determinable upon those lives. Good it be by bargain and sale for years, if the thing be in Lease; that so without Inrollment or Attornment the Rent may pass: else a bargain and sale may be made for a Month, or such like time, and then a Release or Grant of the Reversion in stead of Livery and Seisin. But if a man have a Lease for never so many years, determinable upon life or lives, that is, if such or such live so long, (which unskilled persons call a Lease for lives) this State may well enough be given and disposed by Will, because it is but a Chattel. If a man be seized in Fee or in Tail of Land having Corn growing upon it, and by his Will do give the Corn, and die before severance, this is a good Bequest; because the Corn should have gone to the Executor. So it is also of a Parson touching his Glebe, and a man seized in the right of his Wife, or his own right but for life. But as for Trees growing upon the Ground, these can no otherwise be given by Will, than as the Land it self upon which they grow may be given; of which matter, as not pertaining to the Office

*Stat. Merton.
c. 2. Vidue
possunt lega-
re tam de
ritibus quam
de aliis, &c.
Quer. If the
trees may be
devised by
the Statute
of Wills,
without gi-
ving the
Land it self.*

Office of Executors, viz. how and in what manner Lands may be given by Will, I intend not to treat in these Discourses:

Of the Revocation and Countermand of Wills, and new Publication.

HAVING considered of the making of Wills and Executors, let us, before we come to the Probate, consider of Revocation; for that may take away the force of a Will rightly made. A Will Omne testamentum therefore having two parts, viz. *Inception*, which is the making, and *Consummation*, which is the Death of the Testator or maker of the Will, there is power in him at any time before death to revoke or alter his Will at his pleasure. See the pleading of it by making a later Will. Lib. Intra. f. 323. b. & 641. a.

Consider we therefore of Revocations, and also of new Publications or Re-affirmance of Wills, in whole or in part. As therefore a Will may be made by word, so, also may a Will made in Writing be by word revoked or disannulled: for since every making of a later Will is a Countermand and suppression of the former Will; and since a will may be made Nuncupatively or by word, and so

so by making a verbal Will one may revoke a written Will : it will thereupon follow , that one by word may express the alteration of his Mind thus far, that the Will by him formerly made shall not stand, but be revoked and annulled ; and this will stand and be effectual ; so as if he after die, without making any new Will, or new Publication, or re-affirmance of the former, he dieth intestate, or without Will. As a Will may be wholly revoked, so also in part. Hereabout a good resolution was in a *Kentish* Case, where one *Ryete* by his Will in writing did give some Gavel-kind Land to one *Harrison*, and five days before his death, said, in the presence of Witnesses, that this Gift should not stand, and that he would alter it when he came home ; desiring them to bear witness of his Revocation. Now before he came home, he was killed by the said *Harrison*, who caused the Will in writing to be proved, and after he was attainted and hanged for the murder, and his Son, by the Custom of *Kent*, (*viz.* the Father to the Bough, and the Son to the Plough) entred into the Land.

34 *Eliz.**Dyer* 310. b.

And this manner of Revocation by word
only

only was held sufficient, although the Will in writing were not cancelled, nor defaced. And the like Resolution, for verbal Revocation, is implied in the Case of *Forse* and *Hembling*; where it being resolved, that a Feme Covert, or married woman, by word countermanding and Revoking her Will formerly made, when she was a sole or unmarried woman, this was not effectual, nor of force, by reason of her Coverture taking away the freedom of her Will. Hereby it is implied, that another who hath freedom of Will may by word sufficiently revoke a Will in writing; and so was it since also admitted in the Case between Sir *Edward Montague* and *Jeoffries*, touching the Will of Sir *Jo. Jeoffries*: but there a difference was conceived betwixt saying, *I will revoke my will*, (which only expressed a purpose or intent, and therefore was no present Revocation) and saying, *I do revoke it*, or, *It shall not stand*, or *My heir shall have my Land*; which crossed the gift of it by the Will. And as Wills may be wholly or in part revoked; so may also the Executorship of one or more of the Executors, and yet the Will may stand in all the other parts,

*M. 28. & 29.
Eliz. Co. lib.
4. fol. 60.*

*7 H. 6. fo. 13.
M. 38, 39.
Eliz.*

parts, so as there be any one Executor or more unrevoked: but if all be revoked, then the whole Will is revoked, because no Will can stand without Executors: and this Revocation may be by word only, without being expressed in the Will, or any other Writing. But I could wish all to express such Revocation in the foot of the Will, or that the name or names of the Executor or Executors so revoked be expunged or blotted out of the Will; and that this be done in the presence of some Witnesses, to testify the act and intent of the Testator.

Again, Revocations may be by act in Law as well as in fact, or by direct and express terms: as in the said Case of *Mountague* and *Jeoffries*, where Land being devised by Will, and the Devisor after making a Feoffment, though there were some defect in the Livery to make it effectual; or if he made a bargain and sale that was never inrolled, or granted the Reversion, but no Attornment had, so as the Land passed not; yet in all these Cases the Will or Gift of Land stood revoked. But in case he had only covenanted that he would have made such an estate, and not done it; this was held

to

Vide 6 E. 6.

Dyer 74. &

3. & 47. &

Ma. 42. 2.

See 2. Wms.

3326 2. 11.

See 7. Ref.

to 2. Wms.

above. See

also 2. V. J. Jun. 624

to be no Revocation. And so by some, in case he do but make a Lease, leaving the Fee-simple as it was: But of this *Quere*; And if a difference may not be betwixt making a Lease for years and a Lease for Life, which altereth the Freehold. If a Lease for twenty years be bequeathed to *J S*, and after the Testator maketh a Lease for fifteen years, reserving a Rent; I take this to be no Revocation of the Bequest: but if the Testator, after this Will made, take a new Lease for a longer term, so as the former Lease is surrendered in Fact, or in Law; this must needs be a Revocation of the Bequest, or at least an Adnullation thereof; and that although the Bequest were generally of his Lease, not mentioning the number of years: for this which he now hath is another Lease, and not that which he had at the time of the making of the Will. So, if one give his black Gelding by Will, and after, before his death, he selleth or giveth away that Horse, and buyeth another black one; this new-gotten Horse shall not pass by the Will, because it was not the Testator's at the time of making his Will. So also, if the Crop in the Barn be bequeathed;

D

thed in *October*, and the party lives till that time twelvemonth, having sold that Crop, & sinned a new; this latter Crop shall not pass by the Will, and the former cannot.

Again, as Revocation may be by Alteration of the state of the Devisor in the Land devised; so may it also be by Alteration, in some Case, of the state or quality of the person of the Devisor. As if a Woman sole make a Will, and after take a Husband, this, without any more, as is resolved in the said Case of *Forse* and *Hembling*, doth work a Revocation or Adnullation of the Will; for that else it should be irrecoverable, since she, having lost the freedom of her Will, cannot actually and directly make a Revocation, as we before have shewed. But notwithstanding her Will be revoked; yet in case her Husband before or after marriage with her were bound or covenanted to perform this Woman's Will, if he so do not, by payment of the Legacies therein bequeathed, his Bond or Covenant will stand good, and be suitable against him: as was adjudged touching the Will of *Elizabeth Smaleman*, married after her Will made to one *Wood*, who first was bound to perform it. Yet another Case there

there is of Alteration in the state of the Testator's person, which makes no Revocation of his Will; as if he being of sound mind and ability make a Will, and after becometh frantick. In this case this is no Revocation; so as his Will stands till his death irrevocable, if he recover not. Now of a Will revoked there may be a Reviver by a new Publication; and thereof now.

Of new Publications.

HAVING shewed how a Will may be revoked, and so lose its force; let us now see how, without making a new Will, that so revoked may be revived and set on foot again. And that is divers ways. As first, by a *Codicil* annexed after thereunto; as was resolved between *Beesford* and *Barnetot* in the *King's Bench*. Secondly, by adding any thing to the Will, or making a new Executor. Thirdly, by express speech or word that it should stand, or be his Will: as I conceive to have been the better Opinion in the said Case of *Montague* and *Jeoffries*; wherein yet was much difference of Opinion, both touching

*M. 38. 29.
Elic. in Es.
reg.*

Revocation, and new Publication. If a man, having made a former Will, do make
 44 *Ass. p. 36.* a latter, which is more than a bare Revocation; yet if afterward, lying upon his death-bed and speechless, both these Wills be delivered into his hand, and he required to deliver to one of his Friends about him that Will which he would have to stand, and to keep in his hands the other, & he thereupon delivereth to the Minister, or other his Neighbours, the first made Will, retaining in his hand the latter, as was done in the
 44 *Ed. 3. fol. 33.* time of *Edward* the Third; here the former Will, though made void many years before by the latter, is revived, and shall stand as the partie's Will. But now put the case that a Bequest at the first is voyd; yet by Publication after it may be good: as if one give to *Sarah* his Wife a piece of Plate, or other thing, and hath no such Wife at the time, but after marrieth one of that name, and then publisheth his Will again; now this shall be a good Bequest. So if one devise Lands or Goods which one hath not; if he after do purchase the same, and then say, that his Will before made shall stand, or be his Will, it shall be

be a good Will and Bequest; for this, in effect, is a new making. And though most of the precedent Cases be of Revocation of particular parts of the Will, and not of the total; yet first, be it considered, that that part so revoked was, in effect, the substance of the Will; next, it is easily discerned, that if one part be revocable, so is another also. And thus Revocation may spread it self over the whole: Nay, doubtless, the whole *ut* *no flatu* may be revoked, as well as by parts; even as a Faggot may be put wholly into the fire, as well as stick by stick. And as the *Velleities* or disposing parts of the Will are revocable and revivable by new Publication, as aforesaid; so is also the constitution of Executors. As if one of the Executors names be stricken out, and afterwards a *Stet* be written over his head by the Testator or by his appointment, now is he a revived Executor. So if the Testator express by word, in the presence of Witnesses, that the party put out shall yet be Executor. But now I mean, where the Executor's name is not so blotted out but that it may be read and discerned;

3 & 4 P. &
M. Dy. 143.

for else the *Stat* is upon nothing : and if the verbal Re-affirmance should renew his Executorship, then must the Will be partly in writing and partly Nuncupative, his name not being to be found in the written Will.

CHAP. II.

Of the state of things instantly upon the Testator's death, before any Will be proved.

Here we will consider these several things.

1. *What is wrought by a gift of a thing certain and known ; as the White Horse, the Red Cow, &c.*
2. *What by a Bequest to an Executor.*
3. *What wrought by a release in the Will to a Debtor.*
4. *What by making a Debtor or Creditor an Executor.*

AS touching the first, *viz.* the Bequest of a Chattel, real or personal, which the

the Testator had in possession : notwithstanding that, if the said Testator had by his Deed or writing, or but by word on his death-bed, or before, given these his goods, and died before they had been taken, he to whom they so were given might have taken them ; yet in this case of Gift by Will, neither can the Legatee, viz. he to whom they are bequeathed, either take them or recover them from the Executor, or a stranger take them by any Suit at the Law, for that he hath no property in them ; yea, if the Bequest be to himself who is made Executor, be it of Lease, Plate, Cattel, &c. they shall not vest nor settle in him as Legatee, but as Executor, until express or implied election ; but he is to have & take the same by way of Legacy. And the reason in both Cases is this, viz. That the Law prefers Debts and the satisfaction of them before Legacies, and ties Executors also to that rule; and therefore will transfer nothing from or out of the Executor, till he, having considered of the state of the Debts to be paid, & Goods out of which the same are to be paid, shall find that safely this or that Legacy may take effect without making any defect in payment of Debts, or drawing

1 & 2 P. & Ma. Dy. 110. a. & 139. b. Vide Co. 8 f. 95 & 96.

Of the Second, see Co. 10. f. 47. 652. So resolved Pas. Trin. 37. El. in b. a. m. only Gaw. contra Portman Pl. & Simes Def. See more of this Tit. Legacy; and of the assent of one Executor only.

17 H. 6. 8.

Of late, per-
haps, some
single or
sudden opi-
nions may
also have run
that way: but
in *Portman's*
Case the
Point was
divers times
argued, and
then adjudg-
ed as before.

To be
bought.

upon him and his own Goods any Da-
mage or loss, as a Waster, and there-
upon shall assent to such Legacy. Thus
now is the Law taken; but heretofore
some Opinion hath run otherwise, *viz.*
That he to whom any Bequest was made
of a thing known and certain, might take
it without any assent of the Executor; and
that when to the Executor himself any
Goods or Cattell, movable or immovable,
were bequeathed, in case there were other-
wise sufficient goods for satisfaction of
Debts, the same should instantly upon the
Testator's death, without any act or e-
lection by the Executor, be transferred
into and unto him in his own right as
a Legacy, and not remain in him as
Executor. As for summs of money be-
queathed, or so much in Plate or Rings,
it is evident that they must be had by the
delivery of the Executor: Yet hath the
Legatee such an interest before delivery,
as that, dying before payment, it will not
go to his Executors. But, as I take it, no
such person, to whom any thing certain is
given by Will, can make any Gift or
Grant of it before the Executor have
assented to his having thereof: nor, per-
haps, will the Executor's assent after the
Grant

Grant have such relation as to make good the Grant precedent: Why so, yet, more than an Attornment of a Lessee, which is a like Assent to the Grant of another? And *Quar.* if by the Outlawry of the Legatee before the Executor's Assent this thing bequeathed be forfeited.

Quare Of
this see more
after, *Tit. Le-*
gacy therea-
bout.

If without just cause an Executor will refuse to assent, he is compellable by Law Spiritual, or Court of Conscience: yet if Spiritual Court pres to do, where is just cause to stay, a *Prohibit* lieth, *ut credo*; for since Executors stand liable to recovery of Debts against them by Common Law, it is reason that Law enable them to keep wherewith to pay. And here yet note some seeming opposition in the Law: For where before great difference was shewed between a Devise or Bequest, and a Gift or Alienation executed in one's life time; yet the Lord *Dyer* reports it to be resolved, That where a Lease for years was made upon condition that the Lessee should not alien in his life time, yet a Bequest of this Lease by his Will was a breach of the Condition, as being an Alienation in his life time.

3. Of a discharge by Will to a Debtor some question may be, whether to per-

perfect and make good this, so as the Debtor may plead it in Bar, there be not requisite, as in the former, an assent of the Executor? On the one side, since this giving is a forgiving, for he to whom it is bequeathed cannot otherwise have it than by way of Retainer, it may probably be said, that here needs no such assent of the Executors, as in the Case where any thing is to be transferred; for here is rather an Extinguishment and an Exoneration, than a passage of a Chattel by way of Donation. On the other side, it is probable that, it being but a Bequest, and so a Legacy, since Debts are in Law and Conscience to be satisfied before any Legacies, therefore the Executor having not sufficient otherwise to satisfy his Testator's Debts, may sue for this Debt, and refuse to suffer it to pass away as a Legacy. And to this opinion do I incline as best for Creditors; and satisfaction of Debts is by Law respected as an act greatly concerning the Testator's Soul. But some will, perhaps, make a contrary doubt, that although there be an assent of the Executors to this discharge, yet it will not amount to a Legal Release; for that a Debt, at least if it be by Specialty, cannot

cannot be released but by Deed, and a Will is no Deed; for a Seal is not necessary thereunto, though it be fit and convenient. Whereto I give this answer, that a Will, though it be not properly and legally a Deed, for it may be good enough without a Seal, which is an essential part of a Deed; yet hath it the force and effect of a Deed: for as a Release cannot be made but by Deed; so neither can an Estate or Interest, though but for years, in Tithes, Advowsons, Commons, Fairs, and like things, be granted or assigned otherwise than by Deed: yet it is clear that such a State for years in any of these may be given by Will, as well as a Lease of Land; which proves a Will to have the force and effect of a Deed.

Not de effe,
but de bene
effe.

*Of making a Debtor or Creditor Executor:
and first of the Debtor made Executor.*

Suppose we then that *A* and *B* being made Executors, the Testator was indebted to *A* twenty pounds, and *B* was indebted to the Testator twenty pounds, how do things stand presently upon death? First, it is clear that the Debt of

21 H. 7. 31.
Plow. Com.
185 contr.
Danby &
Chaske, 8 E.
4. 3.

B to

B to the Testator stands in Law extinct ;
 And may be this making of him Executor being a Re-
 granted, that lease in Law.
 he should ac-
 count before
 the Ordina-
 ry for it.

Therefore let Creditors take heed of
 making their Debtors Executors. And yet
 doubtless (methinks) such a Debtor made
 Executor should hold himself restrained
 in Conscience from taking benefit there-

of, if (the Debt remitted) there shall
 want to satisfie either Debt or Legacy of
 the Testator. And I doubt whether a
 Court of Conscience may not justly so
 order, the Testator being perhaps igno-
 rant of this point in law, that this Debt
 should be released by making the Debtor
 Executor.

Yet it seems
Plowd. 186.
a. the Law
was taken to
be ut supra.
8 E. 4.
per Jones.
24 2.

And what is spoken of making the
 Debtor Executor, generally the same is to
 be understood of making any one of the
 Debtors Executor, where there be ma-
 ny joynt-Debtors : and so where many
 Executors be made, and but one of them
 is Debtor to the Testator ; for they can-
 not sue without making him who is the
 Debtor also a Plaintiff, which he cannot be
 against himself. The like Law touching
 Action of Trespas or Account. Yet of
 old, where one made his Bayliff one of his
 Executors together with A and B, who
 brought

Though he
 never admi-
 nister.
21 E. 4. 3. 81.
11 H. 6. 38.
2 R. 3. 20.
per Starkey,
& 22. per
Fawc. for.
9 H. 5. 13.
 Left a De-
 murrer in
 Trespas by
 all, against
 the Execu-
 tor, who was
 Trespasser.

brought an Action of Account against the Bayliff in their two names only, Justice *Herle* held the Action well brought. This ^{3 Ed. 3. 131} was in the beginning of King *Edward* the Third his time; but the contrary hath ^{6 H. 4. 3. 8 Ed. 4. 3.} been since resolved. Some also have held, ^{Cook.} that though in the life of this Executor who was a Debtor he could not be sued; yet after his death, the surviving Execu- ^{21 H. 7. 31. 20 E. 4. 17.} tors might sue his Executor. But that cannot be, as I take it, for that Debt was ^{21 E. 4. 3. 61.} utterly extinct by the making of him ^{Plowd. Com. 36.} Executor, as if the Testator had released it to him; yea, though his Executor died before he did ever Administer or prove the Will. And like extinguishment ^{Plowd. Com. 185.} of the Debt, if the Creditor marry with one of the Executors of the Debtor: yet was there an Action of Debt maintained ^{11 H. 4. fol. 83, 84.} *temp. Ed. 3.* by the Husband and Wife against the Husband and other Execu- ^{31 E. 3. Fitz. Ex. 72.} tors, upon an Obligation by the Testator to the Wife before her marriage. But if a Debtor take Administration of the Goods of his Creditor, this, methinks, should not discharge him, but that his Debt should stand as *Assets* in his hand, because the Intestate did no act to free him from the Debt.

The Debtee or Creditor made Executor.

Plow. Com.
185. By all
the Judges
but Brook
Chief Just.
Plow. 185. b.
where the
goods be of
more value,
which shall
be so alter-
ed?

See Plow.
Com. 544.
the like of a
Legacy of 20
l. given to
the Execu-
tor.

Or if the
goods a-
mount in all
to no more
than this
Debt.

THIS making of the Debtee Executor,
and so the party who both should
pay and be paid the Debt, giveth him
clearly power to pay himself before any
other, if his Debt be by Specialty, or up-
on Record. Nay, some have held, that
so much of the goods of the Testator shall
be altered in property out of the Execu-
tor as Executor, into him as Creditor; but
how that can be I cannot see: For whe-
ther it shall be satisfied out of the Leases
and Chartels, real or personal, whether
out of the Corn in the Barns, Cattell in
the Fields, Plate, or Household-stuff;
this, till some election made by this
Debtee Executor, cannot be known;
nor shall be effected by any operation
of Law preventing the Executor's ele-
ction in taking his satisfaction where
and how he will. For certainly, as an
Executor hath election to pay which
Creditor he will first, so hath he election
to pay and satisfy himself by what
part of the Testator's goods he will;
yet, perhaps, if there be ready money in
the Executor's hands, there shall be an al-
teration

teration of the property of so much there-
 of as was owing by the Testator to the
 Executor. And if there come not to the
 hands of such Executor sufficient to pay
 himself, he may have an Action of Debt
 against the other Executors, or the Heir,
 as by some hath been conceived: Yet let
 it be well advised of, whether, if he do
 Administer at all, and especially if he
 pay himself any part, he have not there-
 by barred or disabled his Suit for the re-
 sidue. But if he refuse to Administer at
 all, it were very unreasonable that he
 should not be able to sue the other Exe-
 cutors: for so a Debtor might by s^util-
 ty make his Creditor an Executor with
 others, and take a course that his goods
 should come only into the hands of those
 others, so as the Creditor could not pay
 himself; and consequently, if he could
 not sue the other Executors, he should
 thus be stripped of his debt by a sleight:
Quer. if he may bring the Action in the
 name of the other Executors only, the
 Will being proved in his name as well as
 in the names of the rest; or whether the
 Action shall be brought in his name
 also, and then he be severed at his own
 prayer. But against the Heir there is
 none

See Plow.
 Com. 185;
 13 H. 8. 15.
 11 H. 4. 83.
 12 H. 4. 21.
 20 E. 4. 17.
 21 E. 4. 3.

Plow. 184.b.
 185.b.
 He is bar-
 red; for he
 cannot ap-
 portion his
 Debt.

12 H. 4. 21.
He may sue
the Heir, if
the Heir be
bound, and
he hath not
sufficient
Goods as
Executor.

none to joyn with him: and him may he sue, if he have not Administred as Executor; this admitted, that the Bond extend to the Heir, which without express words it doth not, though for the Executor it be otherwise.

Thus having considered of the state of things before and without any Will proved, or other act done by Executors; we should now come to the point of the proof: but two things pertinent to it are in order precedent.

C H A P. III.

1. *What may be done by or to an Executor before proving of the Will.*
2. *Of refusal, and the things incident thereunto.*

Before Probate what may be done by or to Executors.

AS to this, it is clear, that before proving of a Will by the Executor he may seise and take into his hands any of the goods of the Testator; yea, enter into

into the house of the Heir (if not locked)
 so to do, and to take the Specialties of
 Debts; and generally he may do all things
 which to the Office of an Executor per-
 tain, (except only bringing of Actions
 and prosecution of Suits.) He may pay
 Debts, receive Debts, make Acquittances
 and Releases of Debts due to the Testa-
 tor, and take Leases or Acquittances of
 Debts owing by the Testator: yea, if before
 such proving the day occur for payment
 upon Bond made by or to the Testator,
 payment must be made to or by this Exe-
 cutor, though no Will be proved, upon like
 pain of forfeiture as if the will were pro-
 ved. Also an Executor may before Probate
 sell or give away any of the goods or cat-
 tels of the Testator. And whereas the As-
 sent of an Executor is necessary to the set-
 tling and execution of a Legacy, as before
 hath been shewed; so as if one give me his
 white Horse or black Cow by Will, or
 any other well known thing, I cannot
 after his death take it, though I come
 where it is, but am punishable by Action
 of Trespass at the Executor's Suit, if he
 do not assent: yet an Executor before
 the Will proved may give his Assent,
 and it will stand good. Yea, although

9 E. 4. f. 33.

47. 7 H. 4.

18. They

cannot sue

till they

have the

Will under

the Seal of

the Ordina-

ry.

Wray. 23 El.

E

he

he die after any of these acts done, the Will being never proved by him; yet do these Acts so done stand firm and good, as I take it. Yet (as I find) an Executor making his Will, and dying before he hath proved the Will of his Testator, his Executor may not prove both the Wills, and so become Executor to both the Testators. But in case the goods were after

22 & 23 E.
Dy. 372.

Debts paid, bequeathed to the Executor, his Executor may take Administration of the first Testator's goods with the Will annexed; as by Doctor *Drury* was in the late Queen's time declared to be the Law and course of the Court Spiritual; to which credit was given by the Judges of our Law and the Court of *Star-Chamber*: for though the Book do not mention it to have been in *Star-chamber*, it is elsewhere

Dy. in Plow.
Com 281.
Case of
Greysbrook
and Fox.

so reported. Yea, an Executor, for goods of the Testator taken from him, or a Trespass done upon the Lease-Land, or a Distraining or Impounding of Goods or Cattel, may maintain, before the Will be proved, Actions of Trespass, or Replevin, or Detinue; for these Actions arise upon the Executor's own Possession.

But before the proving of a Will, an
Executor

Executor cannot maintain a Suit or Action of Debt, or the like. And the reason is, for that therein he must shew forth the Will proved under the Seal of the Ordinary. And so, as I take it, must it be if he bring any Action for Trespass done or Goods taken in the Testator's lifetime; so as the Testator himself was entitled to the Action, and it grows not upon the Executor's Possession. I find ^{34 P. & M. Dy 135. a. Dy. in Plow. Cohn. 281. a.} that an Executor granting the next Avoidance of a Church which to him came from the Testator, the Grantee maintained a *Quare impedit*, without shewing forth the Will: But the Executor himself might so have done as of his own Possession before the Will proved, and so without shewing it under the Seal of the Spiritual Court, as well as Actions of Trespass or Replevin, for goods taken after the death of the Testator: yet in the principal Case of *Greysbrook and Fox*, ^{Plow. Com. 275. b.} which was an Action of Detinue by the Executor for goods taken or detained after the Testator's death, the Plaintiff did shew forth the Will proved. But that proves not any necessity thereof; or that, if the Will had not been proved, it could be no hurt to shew it forth. So upon his

own Contract for the Testator's Goods : as if the Executor sell Cattel or other Goods of the Testator before the Will proved, he may for the money payable maintain an Action for Debt before he have proved any Will : and in this, and the Action of Trespass, there is no necessity of naming him Executor. Also, on the other side, an Executor may well enough be sued for Debts of the Testator before the Will be proved ; for he may not by his own act of delaying the Probate of the Will keep off Suits, except he will refuse in due manner, that so Administration being granted, there may be some body suable by the Testator's Creditors for Debts by him owing, And the usual Plea of the Defendant, to estrange himself from the Testament, is to say, that he neither is Executor, nor hath Administred as Executor. So as if he either be Executor *de jure*, or *de facto*, by his own Act of Administring, it sufficeth.

Of

*Of refusal to prove the Will, and therein of
Administration, fore-cluding
Refusal.*

NOW touching this other point fit to be thought of before we meddle with the Probate, *viz.* Refusal to prove; we will thereabout consider these several parts, *viz.* First, how and in what manner Refusal may or must be. Secondly, in what cases or in respect of what Acts one named Executor hath lost or determined his election of Refusal or Acceptance. Thirdly, of what effect and operation the Refusal is; what difference where all the Executors refuse, and where but some or one of them. Fourthly, what Relation it hath.

Now touching the first: the Ordinary, before committing Administration, where ³ H. 7. 14. a Will is made and Executors named, if he know of it, must send out Process ⁹ Ed. 4. 47. against the Executors, to come in and ³ Hen. 7. 14. prove it: and if they do not come, they ^{Plow. Com.} 281. are to be excommunicate; but if they do come, if they, nor any of them, will prove, by reason of such Refusal the Ordinary may commit Administration: perhaps also they may be appointed Exe-

9 E. 4. 33.
See Pl. 184.

a. If Debtee
made Execu-
tor sue the
Ordinary
for the
Debt, this
amounts to
a Refusal of
the Execu-
torship.

M. 28 & 29
Elix. inter
Brooker &
Carter, in
ba. com.

9 E. 4. 33.
The Book
calls him
Cardinal of
Canterbury.

cutors at a time future, and not presently.
Now Refusal cannot be verbally, or by
word, but it must be by some Act entred
or recorded in the Spiritual Court, and
therefore must be done before some Judge
Spiritual, and not before Neighbours in
the Countrey; for that is not effectual.
Yet Sir Ralph Rowlet making the Lord
Keeper Bacon, Catlin Chief Justice, and the
Master of the Rolls, Executors; they
wrote a Letter to the Ordinary, that they
could not attend the Executorship, and
therefore wished him to commit Admini-
stration, who did so, making every of their
Refusals to be recorded: and this was held
good. So as a Lease being by that Will be-
queathed to Catlin, and he, after this Re-
fusal, entring and assigning it to one, and
the Administrator assigning it to another;
it came in question between them whe-
ther had best right; and Judgment was
given for the Assignee of the Admini-
strator against Catlin's Assignee: whereas
if the Refusal had been void, Catlin had
continued Executor, and so his Title had
been better. For in case the Ordinary
himself be made Executor, there (saith
the Book) he may refuse before his Com-
missary: and so was it there pleaded for
the

the Archbishop of *Canterbury*, who was made Executor to Sir *Will. Oldhalle*.

What shall be such a meddling or Administring by an Executor, that he cannot refuse after.

AS to the second, where an Executor hath Administred he cannot afterwards refuse, because he hath already accepted of the Executorship, and so determined his election: at least the Ordinary ought not to accept of such Refusal, but should compel him to take upon him the Executorship, as the Law was taken both in the time of *Ed. 4.* and of *Queen Elizabeth*. Yet if the Ordinary do admit one to refuse, notwithstanding that he hath Administred, this standeth good, as it seemeth conceived by the Judges in the time of *Henry 6.* For there the Executor commanded one to take Goods of the Testator out of the hands of *J S*, who did accordingly, and afterward the Executor refused before the Ordinary, and Administration was committed to the said *J S*, who brought an Action of Trespas against the party so taking the Goods from him; and there

*9 Ed. 4. 47
Selling Land
as Executor
is Admin.
Dyer in Case
of Greys-
brook and
Fox. Pl. Com.
280. b.
Pas. 7. Eliz.
36 Hen. 6.
f. 738.*

the Refusal and committing Administration were admitted to be good: so perhaps, *Factum valet quod fieri non debuit.* And it well may be that the Ordinary did not know of the Executor's such intermeddling at the time when he did admit of his Refusal. After Refusal, and Administration committed, the Executor cannot go back to prove the Will and assume the Executorship: but if only upon the Executor's making Default to come in upon Process to prove the Will, the Administration be committed; here the Executor may yet at any time after come and prove the Will, and so undo the Administration: as was in the late *Queens* time resolved between *Bale* and *Baxter*.

*Mich. 27,
28 Eliz.*

But what if after Refusal it shall appear to the Ordinary, that the Executor hath Administred before his Refusal, so as had it been then known, the Ordinary should not have admitted him to refuse? whether now may he revoke his Administration, (for it is revokable) and enforce the Executor to proceed to proving of the Will? And surely, methinks he may; for that the Executor by Administring had determined his election, and accepted the office of Executorship:

*Boxel's Case
in Com. Bar.*

now

now he cannot both accept and refuse.

Besides, we know that Creditors may maintain their Suits against him having once Administred; the Common Plea to free himself, and to shew that he is not the party suable for the Testator's Debt, being that he neither is Executor, nor ever did Administer as Executor; wherefore he having Administred, it will be found against him. Now it is not congruous that in the Spiritual Court there should be no Executor, and yet in the Courts of *Westminster* there should be an Executor. But since this point of Administring is so material to the point of being admitted or not admitted to refuse, we will here consider in this place briefly

A being Executor did administer, and yet would not prove the Will. B. took Administration; and being sued for Debt, did plead the matter supra, and it was held a good Plea; and it was found for him before Just. Doeberridge ad Ox. in a Stat. 2 Carol. Reg.

what shall be said to be an Administration by an Executor determining his election, and disabling his Refusal, & what not.

32H. 6. 7.

1. Some will, perhaps, conceive, that the act of the Executor in the fore-mention'd Case, where he only commanded *J. S.* to take goods of the Testator's out of a stranger's hands, was no Administration; and it is true that in that Book it is passed in silence, and not expressly said to be an Administration. But the *L. Dyer*, in the Case of *Greysbrook* and *Fox*, speaking of that

Case,

Case, saith expressly, that the Ordinary might there have rejected the Executor's Refusal; for, saith he, when the Executor had once intermeddled, he should not have been suffered to refuse: so as he doth clearly admit that to have been an

20 *Ed. 4. 17.* Administration. And elsewhere it is

21 *E. 4. 5.* held, that if an Executor take goods of

the Testator, and convert them to his own use, This is an Administration; yea, if he do but take them into his hands, say some, without converting of them. If the Wife take more Apparel of her own than is necessary, this is an Administration, as the Book admits: but if by the assent or delivery of the Executor, it is not. More

21 *Ed. 4. 5.* clearly, If one do either pay Debts of the

21 *H. 6. 19, 20* Testator, or receive Debts, or make Ac-

33 *H. 6. 31. 8* quittances for them, or demand the Testa-

1 *Ed. Dy. 166* tors Debts as Executor, or give away goods

13 *Ed. 3.* which were the Testator's, or deliver mo-

Exec. 91. 3. ney of the Testator's for Fees about prov-

4 *Ma. Dy. 135* ing the Will; all these be full and clear

26 *H. 8. 7, 8.* Administrations as Executor. But, saith

20 *H. 7.* *Fitzherbert*, if he only lay out his own

Kelw. 63. money for Fees, this is no Administration;

21 *Ed. 4. 5.* so saith *Frowick*, if he pay Debts

20 *H. 7 f. 5. a.* with his own money, and if he do it a-

bout the Funerals, But some difference

may

may be between Acts done by one named Executor and by a stranger, viz. to make him an Executor of his own wrong; whereof we shall speak after, not in this place. If one being sued as Executor take it upon him, and plead in Bar as an Executor; this is an Administration.

9 Ed. 2. 13.
14. 33 H. 6.
31. a.

Of the force and effect of Refusal.

AS to the third Point, viz. The force or effect of Refusal; first, it is clear that if there be but one Executor, and he do refuse, or being many, if they do all refuse, then is the party dead Intestate, and Administration is to be committed with the Will annexed, as is before said, nor can any after meddle as Executors. But in case there be divers Executors, viz. A, B and C, and A only refuseth, and the Will is proved by the others, there A continueth Executor notwithstanding his Refusal; so as he still may release Debts of the Testator, and Debts owing by the Testator may be released to him: yea, if Suit be to be had by or against the Executors, it shall not be in the name of B and C only, but A also must be named as a Plaintiff or Defendant,

Cook 1. 5. f.
28. Com. 18
E. 2. Bro. 8.

22 Ed. 3. 19.
15 Ed. 3.
Exec. 8.

41 Ed. 3. f. 22
21 Ed. 4. f. 24

fendant, else the Action may be over-
 thrown. For the Will being proved, all
 the Executors therein named stand and
 continue Executors, notwithstanding any
 of their Refusals; as it was resolved in the
 latter end of the late Queens time, accord-
 ing to divers former Resolutions. And
 therefore this Executor which hath refus-
 ed may afterwards administer at his
 pleasure, and intermeddle with the goods
 as well as the others: yet, saith *Brook*,
 Chief Justice, after the death of his Com-
 panion he cannot so do; but then the
 Executor of him who proved is only to
 administer. *Quod non est Lex*. There may
 be some difference between Suits by Exe-
 cutors and Suits against Executors: For
 when they themselves sue, they being pri-
 vvy to the Will and having the custody of
 it, must bring their Action in the name of
 all the Executors according to the Will;
 but he that is to bring an Action against
 them need not, perhaps, take notice of
 more Executors than those that have pro-
 ved the Will, or otherwise do admini-
 ster: for it is no good Plea for them-
 selves in an Action against them to say
 there is another Executor, without saying
 also that he hath administered, as it seem-
 eth

41 El. Co. 9.
 fol. 36, 37.

4 & 5. Ph.
 & Ma. Dyer
 169. c. 6.
 Contra 21.
 B. 4. 23, 24.

eth by divers Books. Nay, one Book in the time of *Henry 8.* goeth farther, *viz.* That if the Suit be brought against all, yet one of them not intermeddling with the proving of the Will may plead that he was never Executor, nor administred as Executor. By this it should seem that Executors refusing, (I mean all of them, so as no Will is proved) they in an Action against them may say that they were never Executors : but methinks, they should not so plead, but shew the special matter, as was done in the time of *Edward* the fourth.

33 H. 6. 38.
2 Co. 9. 37. 6.
32. H. 6. 25.
27. H. 8. 11.
per totam Curiam.

As for Relation, I will forbear to speak, till I come to proving ; for that Probate and Refusal stand in the same state as touching Relation.

CHAP. IV.

Of Proving Wills.

NOW let us see touching the Probate of Wills what is considerable ; and therein, of these three or four parts :

1. *Where, and before whom, and how the Proof must be.*

2. *What*

2. *What shall be Bona notabilia, to intitle to Probate.*
3. *What force or validity either a right or erroneous Probate hath.*
4. *What relation either Probate or Refusal hath.*

As touching the first point, viz. How, and where, and before whom, Wills are to be proved, briefly thus :

The proving is in the Spiritual Court : yet in some Mannors, by Prescription, Wills are to be proved before the Steward, though no Lands thereby pass, as appears by divers Books: and in the Mannor of *Maunsfield* is this Prescription ; and in others, whereof *Tremeile* was Steward in King *Richard* the third his time, as he declared. And the like I may tell of my own knowledge touching the Mannors of *Comly* and *Caversham* in the County of *Oxford*, where I have kept the Courts of the Lord Vicount *Wallingford*, and found it in present and frequent use. And it is said by the Judges in the time of King *H. 7.* That this proving of Wills in the Court Spiritual is not ancient, but of later time. Yea, it is acknowledged by *Linwood*, the Dean of the Arches, that it pertains not to the Spiritual Court of common right; nor

is

2 R. 2. Fitz.
Co. lib. 2.
fol. 45.

11 H. 7. 12.

is so in use in other Kingdoms. The reason why the Law of England hath herein given way to the Ordinary and Court Spiritual, is said by *Walsh* in *Greysbrook* and *Fox's* Case to be the Piety and Integrity which is presumed to be in those of that Function, having charge of Souls. Indeed they are as it seems to me, Executors of the New Testament, or last Will and Testament of *Jesus Christ*, whereby great Legacies and Gifts are given to men, and by Pastors to be dispensed and distributed: of which Distributers it is required, as *1 Cor. 4. 2.* *St. Paul* saith, *That they be found Faithful.* *Act, 20. 27.* And happy are they who with him can plead *Plene Administravit*, viz. that they have fully Administred, as he did; much depending thereupon, viz. God's honour, the Blessing, Prosperity and Safety of the Countrey, the Piety, Justice, Conscience, Contentation and Salvation of men. As for Wills proved in *London* and *Oxford* before the Major, that is only in respect of the Burgages within those places devisable; but they were to be proved also before the Ordinaries in respect of the goods, and there only where no Lands are bequeathed.

The proving then is to be before the
Ordi-

*Vide fol.
proxim. Of
Bona Notab.
both in Can-
terbury and
York.*

Ordinary, General, Particular, or Special. By General I mean the Metropolitan or Arch-bishop, before whom it is to be proved; in case the Testator have goods valuable, called *Bona Notabilia*, in divers Diocesses whereof he is Superiour.

Of Bona Notabilia.

Canon 92,
93.

VHat shall be said to be *Bona Notabilia* is considerable; for thereabout hath been much diversity of opinion: Some holding that they must be of forty shillings value, some five pound, some ten pound; yea, some, that the value of a peny sufficeth to draw it to the Arch-bishop from the particular Bishop. But that difference of opinion I conceive to be now cleared by a Canon made in the first year of King *Charles* his Reign at a Convocation then held, whereby it is established, that five pound shall be the sum or value of *Bona Notabilia*; yet therein is this *Proviso*, that where by Composition or Custom in any Diocesses *Bona Notabilia* are rated at any greater sum, the same shall continue not altered. It is likewise thereby provided, that if any man die *in itinere*, viz. in his Jour-

Journey or travel, the goods which he then hath about him shall not cause that Administration shall be committed, or the Will proved before the Metropolitan.

Having considered of the value, now another Point observable is, what things shall be said to be *Bona Notabilia*. And as to that, Debts owing to the Testator are *Bona Notabilia* as well as Goods in possession, their value being answerable: yet, I think, if the Penal Sum of the Bond be but five pound for payment of a less Sum, although the Bond be forfeited, yet in the Spiritual Court, where respect to Conscience suppresseth the favouring of Executors, this will not be taken to be *Bona Notabilia*, viz. of five pound value, although in Law the whole Penal Sum be a duty. But if the Debt be five pound or more, though it be desperate, or due from the King, against whom no Suit can be, but only by Petition, yet this will stand for, and as *Bona Notabilia*, as I take it, in the Court Spiritual; though thereabout I can but conjecture, since the Rules of our Law determine it not. And this Point, touching the King's being Debtor, I find debated

21 Eliz.

Goods con-
siderable, or
conspicu-
ous.

Hil. 17 Eliz.
M. Com. Da.
Vide 13 and
14 Eliz. Dy.
305.

ted in the late Queen's time, but not resolved, so far as I find. But there *Popham* at the Bar urged that no Debt should be *Bona Notabilia*; and if it should, yet not such for which no remedy by Suit, as in that Case, the Queen being Debtor. Yet a farther Question Local is touching these Debts or things in Action, in what Place or Diocess they shall be said to be as *Bona Notabilia*, viz. whether in the place where the Debtors be, or where the Obligations, or other Specialties be? And as to this, the Law hath been taken, That because the persons of the Debtors be moveable, passant and transitory; therefore these Debts shall be said to be, and to make *Bona Notabilia* where the Bonds or other Specialties be, and not where the Debtors inhabit and dwell. And so was it not long since conceived by Justice *Walmesley*, and Justice *Beaumont* in one *Pretyman's* Case, no other contradicting it, Herein therefore many are mistaken, who only in respect that the persons of the Debtors do dwell in foreign Diocesses, other than the places of the death of the Testator, or where his other goods were, do take Administration in the Prerogative Court, though the Specialties remain-
ed

ed where the party died, or his goods residue were. But in case the Debts be only by Contract, without Specialty, then indeed they are to be esteemed *Bona Notabilia* there and in that place where the Debtor is, as the said Judges well conceived the difference. But in case Land be given to Executors for payment of Debts or Legacies, this shall not be *Bona Notabilia*, as I take it, though it be *Affers*.

*Of the validity and invalidity of
Probates.*

AS to the third Point, we will first see of what validity an erroneous Proof is, and thereabout we shall find this difference. Admitting that one hath not *Bona Notabilia* in divers Diocesses, so as of right the proving of the Will appertaineth not to the Metropolitan, and yet the Will is proved before him; this is not meerly void, but stands in force till it be reversed by some Sentence upon Appeal; as was resolved between *Vear* and *Jeoffries*, in the late Queen's time. But on the other side, in case one have *Bona Notabilia* in divers Diocesses, or a *Peculiar* and a *Diocess*, and yet the Will is

proved before the particular Bishop within whose Diocess part of the Goods are ; this is meerly and utterly void, without any Reversal. So also of proving in some Peculiar. And in case one have *Bona Notabilia* both in the Diocess of *Canterbury*, and in the Diocess of *York*; the Will must be proved either before both Metropolitans, if within each of their Jurisdictions there be *Bona Notabilia*, in divers Diocesses ; or else, as I take it, if there so be not in any of the places, then before the particular Bishops in those several Diocesses where the goods are. Or, if within the one Jurisdiction Metropolitan the Testator had goods in divers Diocesses, and in the other but in one Diocess ; then in the one place is the Will to be proved before the Arch-bishop, and in the other place before the particular Bishop, as I conceive. And so also of peculiar Jurisdictions. And in some places Arch-deacons have peculiar, or Jurisdiction ordinary, and power to take Probates of Wills, and grant Administrations. But where any like errour or misproving is in these respects, it is cause of Reversal or of Nullity, according to the former difference : so also if there be falsehood

hood in the proof, were it *communis formâ*, that is, without Witnesses, or by examination of Witnesses; yet may it in the Spiritual Court be undone, if either disproof can be made, or proof of Revocation of that Will once made, or of the making of a latter.

Now, admitting the Will true and right, and also rightly proved; let us yet see the force and strength of the Proof or Will so proved. It being under the Seal of the Ordinary cannot be denied, saith one Book, to wit, whether this shewed forth be a Will proved or not; no, though the Proof be but indorsed on the back, *viz.* that it is so proved, saith the Book. But notwithstanding the Defendant so sued may deny that the Plaintiff is Executor, as not being concluded nor estopped by the Probate so to say. And the reason is, because the Seal of the Ordinary is but matter in Fact, and not matter of Record: nor are the Sentences of Divorce and the like, in the Spiritual Court, Judgments or matters of Record, as hath been often held.

9 Ed. 4. 47.

22 Ed. 4. 50.

22 H. 6. 32.

Plowd. Com.

182. 44 Ed.

3. 22. 19.

Ass. p. 2.

Of the Relation of Probate and Refusal.

Plow. Com.
281, 283.

18 H. 6. 12.
2. 9 E. 4. 33.
47. Not to
make good
a Release
made be-
fore.
Co. lib. 5. 18.

AS for this last Point, both the Proving and the Refusal shall have Relation to the death of the Testator, as I take it, to divers purposes. So as to the Proving, saith the L. Dyer expressly and confidently in *Greubrook* and *Fox's Case*; and the resolution also of the Case proves it. For there Administration being committed before any Will proved or notified to the Ordinary, as it should seem, the Administrator sold some of the goods to *J S*, and after the Executors (proving the Will) brought an Action of *Detinue* for those goods against *J S*, who pleaded this Administration and Sale: and thereupon the Executor demurred; and Judgment was given for him, as having by the proving of the Will disproved the Administration *ab initio*. But it is true that Judgement was given only by two Judges; one being absent, and the other dissenting in opinion: yet I think it was right and according to Law, and that Refusal shall have the like relation; else could not the Administration relate to the death of the Intestate, as it doth to some pur-

purposes, expressed in divers Books, viz.
 to have an Action of Trespas for goods ^{39 H. 6. 8.}
 taken before Administration committed, ^{2 Ma. Dyer}
 and to have a Rent growing payable in ^{110.}
 that mean time, &c.

What Fees to be paid upon Probate, or
 for Copies of Wills or Inventories.

Per Stat. 21 Hen. 8. Cap. 5.

1. *Where the goods amount not to above five pound, only six pence to the Scribe.*
2. *Where they be above five pound, but under forty pound, 2 s. 6 d. to the BB. 12 d. to the Scribe.*
3. *Where above forty pound, to be taken but 2 s. 6 d. to the BB. 2 s. 6 d. to the Scribe, or 1 d. for each ten lines of ten inches long, at the Scribe's choice.*

THese Summs are to satisfie both for Proving, Registring, Sealing, Writing, Praising, making of Inventories, giving Acquittances, Fines, and all other things concerning the same.

Where Land is given to be sold, neither

the money raised nor the profits thereof shall be accounted as any of the Testator's Goods or Chattels, saith the Statute.

Note, that the Will is to be brought with Wax thereunto ready to be sealed, and proof to be made of the Will, according to common Custom.

For making the Inventory, the Executor is to take or call to him two Creditors or Legatees of the Testator, and do it in their presence; or, in their absence or refusal, two honest persons, being the next of his kin; or, in their default, two other honest persons.

The Inventory is to be indented, and one part left with the Ordinary, and the other to remain with the Executor.

The Executor is to make Oath for the truth of it.

For a Copy desired by any, either of a Will or Inventory, no more is to be paid than before is allowed for the Registering; with the like election to the Scribe or Register, as is above said.

Mr. *Swinborn* saith, That an Executor is to swear, and if it should be thought fit, to be bound to make a true account, when he shall be thereunto lawfully called by the

the Ordinary. Of this Account see in page 274. And of accounting some Books of the Common Law make mention, as 13 *Edw.* the third, *Fitzberbert Exec.* 91. Where *Trew* saith, that of a thing in Action no Account shall be before the Ordinary; but *Parn* seems of a contrary opinion. And elsewhere it is said, that where a Debtor is made Executor to the Debtee, he shall yet account before the Ordinary for this Debt: yea, as of money in possession, saith one; which others denied. |||

An Executor by wrong shall be drawn to account before the Ordinary, saith *Moyle* Justice. But saith *S. German*, he may not force any to account against the Order of the Common Law; (not shewing what that is.) And *temp. Edw.* the 4. it is said, at least by the Reporter, that after the Will proved, the Ordinary hath no more to do: *quod non credo.*

Also of the Oath of an Executor divers Books tell, but not to such purpose as *Swinb.* but truly to perform the Will.

See also 31
E. 3. cap. 11.
An Administrator shall
account as
an Executor,
Fitz. Ex. 91.
& 837. viz.
18 E. 2. Tit.
Brief.
48 E. 3. 14,
15. Of a duty
resting in
account it is
said, the Le-
gatee shall
have remedy
by Ac-
count in the
Spiritual
Court.
18 Ed. 4. f. 3.
Moyle.
4 H. 7. 15.
per Wood.
9 Ed. 4. 47.
Doct. & Stu.
78. b.
21 E. 4. 22.
Plowd. Com.
544. 4. H. 7.
16. Kelw.
Rep. 64. 2.

CHAP. V.

*What things shall come unto Executors, and
be Assets in their hands, and what not.*

THE things which shall come to Executors are of great multiplicity, and would make a large and confused heap if tied together in one bundle or lump. I will therefore divide and sort them out in parts, after the best manner I can. First, we will divide them into things Possessory, or actually in the Testator; and things in Action, or not actually in the Testator. Secondly, the Possessory into Chattels, real and personal; or (as some less properly express it) movable and immovable.

Of Chattels real possessory.

THese may be divided into two kinds, viz. living, and not living. The living are not many and various. 1. The Wardship of the body of another (be it by reason of a Tenure of the present Owner, or by Assignment from the King or other Lord of whom the Tenure was) is a Chat-

a Chattel real, not personal, though it be an interest in the person of another; but it is in respect of a Tenure of Land, or other Hereditament, and is for years, viz. during the Minority, or till Marriage had, and so is real. Next, a Villain for years (as by Grant for a term from him that had the Inheritance) is a Chattel real. As for an Apprentice for years, it is by Custom, as I take it, that he goeth or is derived to Executors: But for reason after shewed, I think this Interest be not in the reality, but in the personality rather. So of a Debtor in Execution for Debt, the Interest in him, or perhaps more properly in his Liberty, is not, as I conceive, (for reasons which after I shall exprefs) a real, but a personal Chattel. The like Law of a Prisoner taken in Wars. As for Fishes in a Pond, Conies in a Warren, Deer in a Park, Pigeons in a Dove-house, where the Testator had the Inheritance, or but for life, in the Pond, Warren, Park and Dove-house, they are not Chattels at all, nor to go to the Executors, but to the Heir, with the Inheritance. If the Testator were but a Termor, they are to go to the Executor but as accessory Chattels, following the state of

of their principal, *viz.* the Warren, Park, Dove-house, Pond, &c.

The real Chattels not living are either in Houses or Lands most usually, and that three wayes : First, by Lease for years : Secondly, by Wardship of Lands held by Knight's-Service : Thirdly, by Extent upon Judgments, Statutes, or Recognizances ; or in things issuing out of Houses or Lands, as Rents, Commons, Estovers, or such like. But where an Inheritor reserves a Rent upon a Lease for years, this shall not go to the Executor, but to the Heir, with the Reversion, or other then Arrerages of it behind at the death of the Testator. Also Commons, Corodies for years, Advowsons, Tithes, Fairs, Markets, Profits of Leets, and such like, which the Testator had for years, all which may accrue any of these wayes as the first, are Chattels real. Yea, one simple Presentation to a Church, upon the next Avoidance is a real, and not personal, Chattel, before it come to be void ; and what then it is we shall after shew. And the Title accrued to the Crown upon Attainder of Felony, where the party held not of the King, *viz.* the *Annum, Diem & Vastum*, that is,

is, power not only to take the profits for a year, but to waste and demolish Houses, and to extirpate and eradicate Trees and Woods, is but a Chattel; and therefore though granted to one and his Heirs by the King, yet shall go to the Executor, and not to the Heir.

*Temp. E. 1.
Assize 124.
Fitz.*

*Some doubtful or less clear Cases touching
Chattels real.*

First, where we speak of Wardship, it is not to be understood of Wardship by reason of Soccage tenure, for that goeth not to the Executor, but he shall be next Guardian who now, after the death of the first Guardian, shall be next of kin, if the Ward continue under fourteen years old; else he is out of Wardship. Secondly, if one have a Lease for three lives to him and his Assigns, this is no Chattel, nor shall go to the Executor, nor to the Heir, but to him who first enters and claims it as an Occupant, if no Assignment be in the life of the Lessee made: Contrarily of a Lease for many years, if three, or more or less, so long live, this is a Chattel, and shall go to the Executor. So an Extent upon

37 Ass. p. 11.

upon a Statute, yet it is delivered to the party as a Free-hold, viz. *ut liberum tenementum*; but that only makes it to be *quasi liberum tenementum* as to the maintaining of an Assise, if wrongfully put out. Where one is seised in the right of his Wife of Land, or other Hereditament, and is attainted of Treason or Felony, the profit thereof accruing unto the Crown is but a Chattel; and though the King grant it to one and his Heirs, yet it shall go to his Executors. And if one having a Lease for many years, viz. 100, 500, or more or less, doth devise and bequeath the same to *A* and the Heirs-males of his body, and for want of such Issue to *B* and the Heirs-males of his body, and dieth, having Issue a Son; the Term shall not go to his Son, but to his Executor or Administrator; for it cannot be made a matter of Inheritance. So if *A* had died without Issue Male, the Term should not have gone or remained to *B*, but to the Executor or Administrator of *A*; as was lately adjudged in the Exchequer between Sir *Robert Lewknor* and Mrs. *Hammond*. So of an Advowson, or any other Hereditament, granted or devised to one and his Heirs
for

4 E. 3. Aff.
166. Bro.
Chat. 15.

for 100 years : or if such a Termor grant a Rent out of the Land to *A* and his Heirs, or the Heirs or Heirs-males of his body ; yet shall the same go to the Executor , and not to any Heir ; for it being derived out of a Chattel, cannot be any Free-hold or Inheritance, but is it self a meer Chattel. *Portus sequitur ventrem.*

39 E. 2. 37.
So Man-
wood, if
granted for
life, it is but
a Chattel.
Plow. Com.
524.

Of Chattels personal.

PERSONAL Chattels, or goods moveable, are also in like manner to be divided into quick or dead. The quick are Cattel of all kinds ; as Sheep, Horses, Kine, Bullocks, Swine, Goats, Geese, Ducks, Poultry, &c. There may be also in living Creatures reasonable an Interest as in a Chattel personal ; as in the person of a man taken in Execution for Debt. And this I hold to be in nature not a real, but a personal Chattel, (as before was touched) for that Debt is the root of it, and the body is but a pledge or gage, dischargeable instantly upon Payment, Release, or other Discharge of the Debt. Like Law of a Prisoner taken in the Wars ; for thereof and there-

No. na. br.

88. Reg. o.

rig. f. 102.

There is

mentioned,

that the pri-

soner was to

have 159 l.

for his ran-

som. Bro. no.

ca. 295. &

iii. Property

38.

therein, as in a Chattel, hath the party a legal interest : as appears by a Writ of Trespass in that Register for taking away a Prisoner, viz. *Quare quendam Scutum Prisonarium suum cepit*, &c. And notelately, viz. in the time of King Hen. the 8th, the King himself, upon the winning of *Bullen*, bought divers Prisoners of his Subjects. And by a Statute in the beginning of Hen. the 6. his time, this Interest in a Prisoner is mentioned as valuable, and coming from one King unto another; therefore, doubtless, shall go from Testator to Executor by death, and not to be infranchised or freed thereby. The interest which one hath in an Apprentice I take to be rather personal than real, though for years, because not springing out of any real Root, as Wardship and Villainage do, but out of a meer Contract. As for a Servant whose Master is dead, doubtless he is legally discharged, and is not Servant either to Heir or Executor: but meet and honest it is that one of them continue him in service, till a fit time of providing for him a new Master; and fit for him, not to depart suddenly.

Now for things personal without life, these

these are evident, viz. all Household-stuff, Implements and Utensils, Money, Plate, Jewels, Corn, Pulse, Hay, Wood felled and severed from the ground, Wares, Merchandize, Carts, Plows, Coaches, Saddles, and such like moveable things.

*More doubtful Cases touching things
Personal.*

First touching things living. If the Testator had any tame Pigeons, or Deer, or Conies, or Pheasants, or Partridges; these, as well as Chickens, shall go to the Executors: so, though not tame, if they were taken and kept alive in any Room, Cage, or like Receptacle, as Pheasants and Partridges often be; so Fish in a Trunk, as also young Pigeons, though not tame, being in the Dove-house, not able to fly out; yet their Dams, the old ones, shall go to the Heir with the Dove-house. And if the Testator had any reclaimed Hawks, they also as Chateaux personal shall go to the Executor, because they are things commonly vendible. And whereas Hounds, Grey-hounds and Spaniels be not so commonly bought and sold, nor so anciently have been; yet are they now grown to be

10 E. 4. 14,
15. Come of
wild ones.
22 H. 7.
Kelw. Rep. f.
88. l. 8. Co.
1 l. 11. f. 50.
18 H. 8. 2.

10. E. 4. 14,
15, and 18.
So of young
Hawks in
the nest. It
is Felony to
steal these;
ergo, they be
goods.

So an Hunter's Horn, a Faulkoner's Lure.

Hares, Deer, Pheasants, Partridges, wild Ducks, &c. are good meat.

a Merchandise, and why not? for although they be for the most part but things of pleasure, that hindereth not but they may be valuable, as well as Instruments of Musick, both tending to delight and exhilarate the spirits; a cry of Hounds hath, to my sense, more spirit and vivacity than any other Musick. Add hereto, that there may be some profit and advantage gotten by them, both *quoad adeptionem boni, & ademptionem mali*, the getting of some good food, and the preserving of others, as Lambs, Conies, Fish, Poultry, by killing Foxes, wild Cats, and others, which destroy them. And we know that money is recoverable in Damages for taking away such, or a Mastiff serving to keep an house; so of Ferrets, to catch Conies, &c. Therefore they are valuable. But it may, perhaps, be objected, that none of these above are Cattel, and therefore not replevisable, consequently, no property in them; for when more than one living Cattel is distrained, the Replevin is to be by the name of *Averia*, signifying Cattel. For answer, not to insist that one may have property in divers things whereof no Replevin lieth, as Corn or Hay not in Sacks nor Carts,

Carts, Money not shut in bag nor box, &c. I farther say, that even the word *Averia* may be applied to these: for so I find to Hens and Capons in the Book of Entries, viz. in the Writ of *Curia claudenda*, where the Plaintiff complains of the Defendant's not making his Mounds, *per quod Averia ipsius A*, viz. Capones, Galline, & alia *Averia ipsius A*, that is, whereby his Cattel, viz. Capons and Hens, and other his Cattel, came into the Plaintiff's house and garden to his damage, &c. And both *Newport* and *Newdigate* hold that a Writ of Replevin lieth of such things. Though *Brudenel* were of contrary opinion, yet he also held an Action of Trespas maintainable for taking of them, and therefore admitted a valuable property in them. Now come we to things without life; and first, to those abroad in the fields. Put the case that a man dies in *July* (before Harvest I mean) seized for life, or in Fee or Tail, in his own right or his wives, or estated for years of Land in the right of his Wife being sown with Corn or any manner of Grain, the common saying is, *Quicquid plantatur solo, solo cedit*: yet this shall go to the Executor of the Husband, and not to the Wife or Heir, who shall

Fol. 142.

Hen. 8. f. 3.

Roots of
Carrots,
Parships,
Land sown
whereon is
ripe Corn.

For he was
Tenant for
life in effect.

have the Land, but Hay growing, viz. Grass ready to be cut down, Apples, Pears, and other Fruit upon the Trees, shall go to the Wife; as also if they had been upon a man's own Land of Inheritance, they should go to the Heir, though the Corn should go to the Executor. The reason of difference is, because this latter comes not merely from the Soil without the industry and manurance of man, as the other do: and I take Hops, though not sown, if planted, and Saffron and Hemp, because sown, to pertain as Corn to the Executor. All those yet shall pass to one to whom the Land is sold or conveyed, if not excepted, though never so near reaping, felling or gathering. But what if the Wife had the Lease for years, as Executor to some former Husband or other Friend, and the Husband after sowing dies? who then shall have the Corn? Certainly the Corn shall go to the Executor of the last Husband, at least so much as is more than the years value of the Land, or the making it up by addition of other things; for the value is to be *Assets* for payment of Debts and Legacies. Put the case again, that the Husband and Wife were joynt-tenants of the Land; then

then the very Corn growing shall survive to her together with the Land; and though the Husband sowed it, yet shall it not go to his Executor. Being in consideration of things growing on the ground, let us not forget to think of Trees sold by

The Wife also shall have convenient appa-
rel. 33 H. 6.
21. 2 Eliz.
Dyer.

*J*S seised of the Inheritance of the Land to *J*D, who dieth before felling; this Interest is a Chattel, which shall go to the Executor, and not to the Heir of *J*D: but some colour may be that these, because fixed to the Soil and Free-hold, are real Chattels, as the interest in Land is, and not personal. So also of Trees excepted by him who selleth the Inheritance of the Land. But in both Cases I conceive this Interest to be personal, and not real; for that, as it is a propriety of Chattel in the Vendee or Vendor with exception, it stands in consideration severed and abstracted from the Soil or Ground where the Trees grow, though the Trees be not actually severed by the Axe from their Mother Earth. But if the Lessee for years or life do except the Trees, these continue parcel of the Free-hold and Inheritance. And after Corn reaped, and before Tithe set out, the Inheritor of the Tithe dying, I think the

Co. li. 1. 38.

Executor, and not the Heir shall have the Tithe after set out.

Now let us come home to the Testator's House, and see in and about it. Some doubt what pertains to the Heir, and what to the Executor. Question hath been of old, and of late, touching Cop-
 pers, Leads, Furnaces, Fats for Dy-
 ers or Brewers, Pales, Rails, Glafs
 in Windows, Tables, Dormants, Wain-
 scots, Doors, Locks, Keys, and such
 like, to whom these should go, whe-
 ther to the Heir or Executors. And in
 the latter end of *Henry* the seventh his
 time, an Executor taking a Furnace
 which was set in the middle of a house,
 and not fixed to any Wall, the Heir
 brought an Action of Trespass against
 him for so doing; and it was adjudged for
 the Heir, viz. that this was to go as part
 of the Free-hold and Inheritance to the
 Heir. And long before, in *Edward* the
 third his time, it was debated, whether
 it were waste in a Lessee to remove or
 take away a Furnace, or not: But I find
 no opinion delivered by the Judges. But
 in the late *Queens* time, Justice *Walmesly*
 said that the Lord *Dyer's* opinion was,
 that where the Furnace is not fixed to the
 Wall,

Of Houses,
 or things a-
 bout the
 House, 42 E.
 3. 6.

21 H. 7. f. 21.

42 E. 3. f. 6.

Wall, the Lessee might within his Term take it away. Contrarily, if it were fixed to the Wall; for then it strengthneth the house. And yet, notwithstanding it might be in the one Case so removed by the Lessee, yet it is not there, as he said, a Chattel personal or moveable, so as it is attachable. And there the Case being, that a Clothier, being a Termor of an house, had fixed a Copper to the Wall, with Looms and Pricks necessary for his Occupation; a Judgment being had against him, the Sheriff delivered the Copper in Execution as a Chattel, and after the Lessee took it up, and it was taken from him by virtue of the Execution: whereupon he brought an Action of Trespass, and by all the Judges the Action was maintainable. And whereas it was found by the Jury, that by the Custom of *Kent* the Lessee might remove such a Copper; Justice *Beaumont* said, that without any Custom a Lessee might so do at any time during his Term. But it is to be noted in the said Case, that the Furnace was by it self delivered as a movable Chattel, and not as part of the house; for that was not meddled withal, nor at all delivered in Extent, (as

*H. 37. Eliz.
Austin's
Case.*

in the Case between *Miles* and *Pratt*, where both House and Copper were delivered upon a Statute) the House belike being held upon such a rack-rent, as that the party did not desire to have it, for he might have had the whole being a Chat-tel, and so have used the Copper during the term. And as touching all other fixed things, the Law was taken in the said case in *H. 7.* his time to be all one as in the case of the Furnace, *viz.* that they should go to the Heir; save only that for Glass in the windows, *Pollard* said it was otherwise, *viz.* that that should go to the Executors, which none there denied.

Co. lib. 4. fo.
9. 94.

But since, in the late Queens time, it was otherwise resolved touching Glass, that it should not go to the Executors, and the like was there said touching Wainscots, and so also by the Lord *Anderson* in the said case of *Austin*. And touching Posts fixed, for that they be parcel of the Free-hold, so also of Mill-stones, An-vils, Doors, Keys, Windows, none of these be Chattels, but parcel of the Free-hold, or thereto pertaining, therefore not the Executor's.

Things in
Gardens.

Now to come to Gardens also: whereas I before laid down a difference be-

betwixt things sowed, or not arising from the Earth without manuring, and such as grow of themselves; it will thence be concluded that the Roots of Carrots, Parsnips, Turnips, Skerrets, and such like, coming and arising from yearly sowing, must go to the Executor, and not to the Heir; the case being so, that the Gardener and Sower had the Inheritance of the Garden or Soil. Now though in most places this can rarely be a question of value, yet about *London* and some great Towns it may, and therefore is not unworthy of a line or two, a thought or two, the rather, for that the reason of this case may give light touching right in other cases. And, in my opinion, these (notwithstanding there is a sowing and manurance to generate them and cause, their being) shall go to the Heir, and not to the Executor. My reason is, for that the thing of profit is the Root, which is hidden in the ground, I hold it no reason, nor agreeable to Law, that the Executor should dig and break the soil and ground to search for her entrails: he is to content himself with that which is above ground, as Melons of all kinds, and the like, whose fruit is above the ground; but

as

as for Artichokes, though the fruit be above the ground, yet I think they have not such yearly setting or manurance as should sever them in interest from the Soil, therefore they shall go with it to the Heir.

Let us now consider of things, though not fixed to, yet usually kept in houses, *viz.* Writings and Evidences, whereabout generally no doubt can be, but that they follow the interest of the Land: so as if they touch Inheritance, they pertain to the Heir; if but Terms of years, Goods, Châttels, or Debts, they pertain to the Executor: yea so do Statutes and Bonds in Law, (howsoever otherwise in equity) though they concern the assurance and enjoying of Inheritance purchased. What if *A* mortgage the inheritance of Lands to *B*, upon condition of Redemption by payment of five hundred pound to *B*, his Heir, or Executor, and *B* dieth, the Deeds being delivered into his hands? now the Heir, not the Executor, shall have them: for though the money may be payd to the Executor, yet (mean-time) the Land descends to the Heir, nor is there any Debt to the Executor, for *A* may chuse to pay, or not. Put it
on

on the other side, that the Land had been sold for five hundred pound not paid to *A*, but a Condition, that if not paid to him, his Heir or Executor, by such a day, then to re-enter; and *A* dieth: here is a Debt to the Executor, and no Land descended to the Heir of *A*, yet shall the Heir have the Deeds, for that a Condition is descended to him. Question hath been touching Boxes and Chests wherein the Evidences concerning Inheritance are: and although the better opinion in our Books doth pitch upon this difference, that where they are sealed up, they shall pertain to the Heir, otherwise, where not sealed; I cannot conceive that difference to be grounded on good reason, but rather think that Boxes, which have their very creation to be the houses or habitations of Deeds, should, as appurtenant to them, go to the Heir, whether sealed or not. On the other side, Chests made for other uses, viz. the keeping of Napery or Apparel, shall not, as I conceive, be taken as appurtenant to Evidences because some be in them, for so may other things also be: Nor as touching them can sealing be of any effect, but rather locking and not locking

41 E. 3. 2.
36 H. 6. 26.
18 Ed. 3. 4.
3 H. 7. 15.

Que. If sole use that way make a difference or not.

locking, must make the difference touching them, if any difference by inclosure.

CHAP. VI.

Of things not actually in the Testator, but accruing to the Executors by or after the Testator's death.

THESE be of divers sorts: the first and chief whereof are things gotten and acquired by Action or Suit; secondly, by Condition or Covenant without Suit; thirdly, by Remainder.

Of things in Action.

TO speak first of the first, it is clear that Debts due to the Testator, be it by Bond, Statute or Judgment, or for Arrerages of Rent, are not *Assets* to charge the Executor until receipt of them: and it is clear that the Action to recover these doth pertain to the Executor, and that the Debt and damages recovered shall be *Assets* to charge the Executor. So also of Actions of *De. jure* and
of

of Covenant for any thing personal, or any Chattel real, Lease, Wardship, or the like. But perhaps some will doubt of Covenant touching Inheritance, *viz.* the assurance of Lands, or enjoying thereof free from this or that incumbrance, or the like: Yet even in those cases, if the Covenant were broken in the Testator's life-time, I think clearly the Action is accrued to the Executor, for that his Testator was to recover damages in the Action of Covenant for that breach; and he being entitled to these damages as principal, and not any accessory thing in that Action, the Law hath cast that Action upon the Executor. And that is the cause why, if Waste be committed in the life of the Lessor by his Lessee, and then the Lessor dieth, his Heir can have no Action for this Waste, *viz.* because he cannot recover the treble damage; so neither can the Executor have it, for that he cannot recover *locum vastatum*, the place wasted, the Inheritance whereof is in the Heir.

That the Executor at the Common Law could not maintain an Action of Trespass for goods of his Testator taken away in his life-time, seems to be implied by the Statute in the time of K. Edward

A Church of the Testat. Inher. become void in his life comes to the Exec. as a thing in Action; but is not *Assess*, for not vendible.

11 H. 4. 32.
45 E. 3. 3.
No. na. br. 59
4 E. 3. c. 7.

the

And the like
given to
Executors of
Executors
per Stat. 25
E. 3. c. 5.
17. E. 3. Fit.
106.

C. 21. meant,
ut credo.
21 H. 6. 1.
But Mark-
ham è con-
tra.

21. H. 8. c.
19. 4 E. 3.

the third, which gives such action. Yet it seems that a Replevin was maintainable by the Executor, at least in some cases, for goods taken or distrained in the Testator's life-time. But in case the Distress were for Rent or Service, it is said a little after the making of that Statute, that the Lord may not now avow for his Rent or Service, because his Tenant is dead, but must set forth the matter, and thereupon justify to excuse himself from answering damages; and the Executor shall by this Action recover the Cattel or Goods, and that by the Common Law, saith the Book, though the Statute of *Marlebridge* had never been made, for that the propriety remained in the Testator. Note, it speaks not at all of the said Statute of 4 *Edward* the third. But *Newton* in the time of King *Henry* the 6. would have it, that the Executor in that case should not have a Replevin, but an Action of Trespass grounded upon the said Statute, viz. 4. *Edw.* 3. which methinks cannot be by any means, by reason of the Statute of *Marlebridge*, cap. 3. *Non ideo puniatur Dominus*, &c. for the Executor, as well as his Testator, is thereby restrained, as I think, from the Action

on of Trespas against the Lord. As for that no Avowry can be made upon the Tenant, that is now remedied by a late Statute. The other Statute hath been taken to extend to other things than goods moveable: for where a Church becoming void, a stranger presented thereunto wrongfully, and the Patron died; it was resolved in the late Queens time, that the Executor might by the equity of the said Statute maintain a *Quare impedit*. But whether an Action of Trespas lieth for an Executor against him who spoiled the Testator's Corn, Grass or Wood growing, hath been questioned, but nowhere resolved to my knowledge. I think it may lie with some difference. First, for that the Statute of 4 Edward the third doth not only speak of Goods carried away, as limiting the Law to that trespass solely and particularly, but speaks generally of Trespas done to Testators; and then brings in that particular of goods, as one Instance. Now there be many Cases of Instances or ensamples given in Acts of Parliament, which yet do not restrain the remedy or Purvieu to that particular, or from extending to other Cases of like nature.

The B. of
Coven. & L.
and Sale's
Case M. 32
& 33 Eli. in
com. ba. So of
Ravish-
ment. Pl.
gard. 7. H. 4.
2. & 7 H. 4.
6. Ejec.
Firm. &
Tild. De
clauso fra^{to}
meerly it li-
eth not.
11 H. 4. 3.
This Periam
Just. did ve-
ry judici-
ously urge
in Sale's
Case *supra*.

ture. Thirdly, the Stat. speaks of Trespasses remaining unpunished, which it meant to redresse: But it should still leave many unpunished, if it should have no larger extent than to that one singular Trespasse of Goods taken away, viz. moveables. Again, the Testator was clearly entituled to a recovery of damages for this other Trespass, which if he had recovered, should have come to his Executor: Yea, the things themselves, all, if felled in the Testator's life, and part, though not felled, should have come to the Executor; therefore all the damages recoverable in lieu thereof, out of which (recovered) the Debts and Legacies of the Testator are to be satisfied. Beside, this Action of Trespass is a thing severed from the state of the Land, so as if the owner thereof had, after this Trespass done, aliened the Land, yet had not this Action remained to him, as I take it clearly. And why not, as well as where a Trespasse is done upon the Lands of the Lessee, and then the term expires? this doubtless doth not take away his Action, nor his Executor's. But methinks here may be some differences probably taken: as first, between a Trespass

pass in destroying or taking away Corn growing, and a Trespass in Grass or Wood growing. For the first being of that nature, as that, though the Owner had a state of Inheritance in the Land whercon it groweth, and should have died before severance and selling, yet it should have gone to the Executor, and not with the Land to the Heir; therefore doubtless both the Action for destroying or taking away thereof accrue by the operation of Law to the Executor, in lieu of the thing taken or destroyed. Otherwise, perhaps, of Wood or Grass, which by the Owner's death should have gone to the Heir, and not to the Executor. And yet here again another difference, methinks, may be betwixt Grass and Grass, viz. betwixt that in Pasture and that in Meadow, yearly mowed and turned into Hay, not left to be consumed by the mouths of Beasts, as that growing in Pasture: For as the Law distinguisheth between these Soils, it gives precedency to Meadow, and makes it waste for a Lessee to plow it up, not so for Pasture. Yea, Tithe is paid of Hay, but not of Grass growing in Pastures: so the Meadow-grass, being in the Owner's pur-

pose) and intention, as a thing severed from the Soil, should methinks, so be also in the eye and estimation of the Law, and therefore stand in a different state and account from Pasture-grass.

A third difference may be in the manner of the Trespass, viz. Where Meadow-grass is eaten up with Cattel by a Trespasser, and where by him mowed and carried away as Hay: for in this latter case an Action of *Trespass* and *Conversion* for so many Loads of Hay is doubtless maintainable by the Executor; though it should be admitted that in the other case, of consumption by the mouths of Beasts without severance, no Action should be maintainable by the Executor; which yet I admit not, but think the contrary probable.

For when Meadow-ground, which yearly conceiveth, (*Sol sine homine generat herbas*) shall be ready to be delivered of her burthen, if a stranger put in a herd of Cattel, which swallow up and tread down this fruit of her Womb before the Mower with his Sickle come as a Midwife to help her delivery, if then by the hasty death of the Owner, before Action brought, this great Trespass should be dispensible, it were

At least, methinks, Action upon the Case here and before should be maintainable.

were contrary, as methinks, to the purpose of the said Statute, and a great defect in the Law.

Yet here, perhaps, touching this a fourth difference may be, or arise out of the time of the death of the Owner, *viz.* where he dieth before time of Mowing, and where not; for *sato* that in the former case, because if such destruction or consumption had not been, yet the Owner dying before severance, this should not have come to the Executor, but have gone with the Soil to the Heir, that therefore the Executor who is not damaged, should recover no damages; yet in the other case, the Owner living till after May-time, clearly passed, *viz.* till the end of *August*, methinks now, since this fruit of the Meadows Womb should have been a Chattel severed, had not this Trespasser made unlawful prevention; therefore the Executor, to whom the same should have come towards the performance of the Will, should have, out of the said Statute, an Action and remedy reached unto him, to recover recompence in damages for this wrong done *in retardationem Executantis Testamenti.*

A fifth and last difference may per-
haps be in the state of the Owner: so-
Posito that where the Land is his Free-
hold or Copyhold Inheritance, no Action
should be given to his Executor for Wood
or Grass taken or destroyed in his life-
time; yet where he is but Tenant for
years, Gardian, or Tenant by extent, so
as the very state in the Land was to come
and is come to the Executor, (together
with *quicquid plantatur solo*) methinks
the Executor should have, together with
the state in the Soil, the Action to punish
the Robber of or Trespasser upon the Soil.
Thus having scanned and sifted, to the
best of my ability, all differences and
circumstances of this Point, how far I
am wide and wherein right *Aliorum sit
judicium*, or rather, *Aliorum est judicium*.

3 H. 6. 3.
Littleton, fo.
4. 1.
So he
Sale's
of dama-
ges in *Eya.*
impd. re-
covered.
Contr. of the
Present-
ment, Re-
leasing.
13 Ed. 3.
Tit. 91.

But this is clear, that wheresoever Execu-
tors do recover any damages for Trespas
or other wrong done to their Testator, the
money recovered (at least if Execution
be had, or money received) will be *As-
sets* in their hands, as well as Debts reco-
vered upon Bonds, or Bills, or Lands by
them taken in Extent upon Statutes, Re-
cognizances or Judgments. Yea, without
ever having these moneys, Executors may
make

make them *Asser* in their hands, viz. by making Releases or acquittances, or acknowledgment of Satisfaction, for this amounteth to a Receipt, and chargeth the Executors towards the Creditors with the whole penal sum; though haply they receive but part, as the principal, or some like proportion.

Therefore there is great caution to be used by Executors in this kind, that unless they be sure they have Goods sufficient to pay all Debts and Legacies, they make no Release, Acquittance, or Acknowledgment of satisfaction, for more than they receive, be it Debt or Damages.

And the like caution is to be used by them touching submission of Debts or damages to Arbitrement, whereby discharges of the same may grow: for the submission to the Arbitrement being their voluntary act, although the Arbitrators by their Judgment do discharge the Debt or damage in part, or in whole; yet shall the Creditors have like remedy thereupon against the Executors as if they had released, or, which is more, received the same.

Other Actions there be of Discharge, which as the Testator himself in his life

Error 13 H.
4. 6.
46 E. 3.
Yet upon a
Verdict in
Quare im-
ped. the
Wife, not
the Execu-
tor of the
Husband,
did seize.
9 H. 6. c. 4.

time might have had, so may his Executor after his death, viz. Writs of Error, Attaint, Disceit, *Andina Querela*, *Identitate nominis*. But this last is given by Statute. Whatsoever is regained by any of these ways as unduly lost by the Testator, shall also be *Assets*.

Special Cases pertinent to the
Premises.

1. *Chattels come to the Executors from the Testators, yet not Assets.*
2. *Assets which be no Chattels.*
3. *Things in Action, and in the Personalty, turned into Chattels real, & c. contra.*

AS to the first, I exemplifie thus: *A* makes *B* his Executor, and dies; *B* makes *C* his Executor, and dies: the Goods left by *A* to *B* as Executor far exceed his Debts and Legacies. Or let us suppose no Debts nor Legacies of *A*, and that *B* dieth much in debt above the Goods he leaveth, and did make no alteration of the property of the Goods of *A*, but meerly left them to *C* his Executor.

Now

Now shall not the Goods which came to B as Executor of A, and so from B to C, be liable in Law to pay the Debts of B: yet in Conscience methinks they should, and that C should not receive them to his own use, as in Law he may, where A left no Debts. But if A, making B Executor, did also by his Will give him all his Goods, and he in his life-time made election to have them as Legatee, or by his Will did so dispose of them, or appoint them to go, as the Goods he had as Executor, they could not be otherwise given or disposed. Now by this election they were altered in property from being his as Executor, and so as his own Goods should be liable to his Debts. But things in Action could not be so given or disposed, viz. Debts, &c. Yet if D were indebted to A one hundred pound, and B his Executor took new Bond of him, or another for it, giving up the old Bond: now was it become his own Debt, and so shall stand in his Executor.

Another instance of this, thus: If A, Patron of the Church of D, grant to B the next Avoidance, the Church becomes void, A dies before he presents, his Executor presents, and hath the benefit

Or if a stranger usurp in his life, and he dying, his Executor

recovers in
a *Qua. imp.*
as by Sale
was done
infra. Mich.
32 & 33 E-
liz. So held
in Sale's
Case, in com.
ban. Vender
jure potest,
emerat ipse
prim.

of preferring his Son or Friend; yet shall this make no *Assets* in his hands for payment of Debts, for that he could not lawfully take money to present. But if B had died before the Church had become void, then, because the Executor might lawfully have sold it, the value should be *Assets* in his hands, as I conceive; except perhaps the Incumbent had died so hastily after B, that the Executor had not time convenient to find out a Chapman and to sell it.

If in the other Case a stranger had presented, and got his Clerk admitted, and the Executors of B had in a *Qua. imp.* recovered damages; the money so recovered should have been *Assets*. Thus much of the first, viz. that some things of the nature of Chattels may come to Executors, and yet not be *Assets*.

Touching the second, viz. that some things may be *Assets* in the hands of Executors which yet are no Chattels, I shall give but two instances. First, where a man leaveth a Villain for years to his Executors, and the Villain purchaseth Land in Fee simple, and the Executor entreth into the Land; now hath he Fee-simple therein, and this Land is

Assets

23 H. 8. Br.
Villainage
46. If he die,
how shall
this be *As-*
sets in the
Heir?

Assets for payment of the Testator's Debts. So if a man by his Will give Lands in Fee to his Executors, to be sold for performance of his Will; these (before the money thereby raised) are *Assets* both for payment of Debts and of Legacies. But if the Lands had been given to be sold only for payment of Debts, they should only be *Assets* for that purpose, and not for payment of Legacies: and so if it were expressed to be for payment of Legacies singularly, this should not be *Assets* for Debts, as I take it. For since these are not *Assets* of their own nature, but so made by the Will and disposition of the Testator; methinks they cannot be otherwise nor farther *Assets* than as the Testator hath willed and disposed. But though Lands thus given were *Assets* before the Stat. 21 Hen. 8. cap. 5. yet how can it be so, since the very words of the Statute be, that if one do will by his Testament or last Will any Lands, &c. to be sold, neither the money thereof coming nor the profits taken shall be accounted as any of the Goods or Chattels of the Testator's; which I conceive to be all one as to say, that they should not be *Assets* for

3 H. 3. 43.
and so 2 H.
4. 22. If by
Feoffments
For Mark-
ham cap.
Fast. con.
Rinkbill.

See 9 Eliz.
Dyer 234.

for when an Executor denieth himself to
 have *Assets*, the form of his Plea is;
Quod nulla habet bona nec catalla, &c.
 Yet since that Statute, *viz.* in the late
 Queens time, the Law was twice admit-
 ted or conceived still to be according
 to the third of Hen. 6. *viz.* that the Land
 devised to be sold, or the money thereof
 coming, should be *Assets*. Indeed in nei-
 ther of those Books is there any mention
 of the clause in the said Statute; and
 it is possible that it might be forgotten;
 as in other Cases sometimes hath hap-
 pened. But casting about how to reconcile
 those Books with the said Statute, and
 not to suppose the same forgotten at both
 times, both at the Bar and Bench,
 (though being but a short clause in
 the middle of a large Statute to other
 purpose, it might well so have been)
 at the last, though not hastily, I grew to
 conceive, that the said Clause being in an
 Act which limiteth the Fees of Ordina-
 ries, and their Scribes, according to the
 value of the Goods of the deceased, and
 then bringeth in this Clause, that the
 Lands willed to be sold shall not be ac-
 counted as any of the Goods, &c. the
 Parliament meant thereby only to ex-
 clude

clude them to this purpose, that they should not be accounted as part of the Goods in the valuation, according to which the said Fees were to be rated: and though the words be general, that they shall not be accounted as any of the Goods, &c. yet is it the more probable that the Parl. intended no farther than as aforesaid, because that clause, after the Fees limited in answerableness to the values, is brought in by a *Proviso*, viz. Provided always, that if the deceased willed any Lands to be sold, the money nor profits shall not, &c. And thus perhaps it was understood and construed in the said late Queens time; though no mention be of any remembrance of that Clause or Provision in either of those Cases reported by the Lord Dyer.

As for the third, viz. the changing of things out of the Personalty into the Realty, & *e contra*, I shew it thus: If a Debt were due to the Executor as Executor, by Statute, Recognizance, or Judgment, and he sue Execution, and have Land of the Debtor's in extent, now is the personal duty turned into a Chattel real. On the other side, if such an Estate by Extent, or a Lease for years

mortga-

mortgaged, come to an Executor, and the Debtor or Mortgager payeth the money due: now are these real Chattels turned into *Assets* personal.

Another special Case of Equity opposing Law.

IF *A* be bound to *B* by Bond, Statute or Recognizance, for assurance of Land, *B* dieth, and the Land descends to his Heir; or be it that *B* sold the Land to *C*, and assigned to him the Bond, Statute, &c. yet must the Suit or taking out be in the name of the Executor of *B*, and neither of the Heir or Assignee. And that which is recovered or gotten in Extent will be *Assets* in Law to charge the Executor, as I take it; yet in Equity it pertains to the Heir or Assignee. *Quere*, if the Executor meddle not, but only suffer his name to be used.

Of things come to Executors by Condition.

First, we will consider of Conditions bringing back to Executors Goods or Chattels granted away by their Testators. Touching which there is no doubt, but if the Condition be any other than for payment of money, or other things

valuable by the Testator or his Executor, Note diff.
the Chattels returning to the Executor are
Assets in his hands; as put the Case a
Lease for years, Horses, Sheep, Plate, or
other Chattel, were granted by the Te-
stator to A, upon condition that if A
did not pay such a sum of money or do
such other act as the Testator appoint-
eth, &c. and this Condition is not per-
formed after the Testator's death, now is
the Chattel come back to the Executor,
and his *Assets*. But the question hath
been, (and perhaps may be) where the
Condition is, that the Testator or his Exe-
cutors shall pay the money to make void
the Grant, and accordingly the Executor
after the Testator's death payeth the
sum out of his own purse, not ha-
ving any money of the Testator's in his
hands: in this Case coming in question
tempore Hen. 7. it was resolved at the last, 21 Hen. 7.
that this redeemed Chattel should not be
Assets, but be to the Executor as his
own proper Goods; though at the first
three Judges were of contrary opinion,
viz. that the Goods redeemed should
be in the Executor as Goods of the
Testator. And truly I must confess,
that I cannot yet find good satisfacti-

on in that Books resolution, except we shall take the case there to be such as that which is put and reported by the Lord Dyer, *tempore Hen. 8. viz.* that the money paid for redemption was as much as the full value of the Goods pledged or mortgaged; or else shall admit the Case to be, that this redemption was not by payment at the day conditioned. As to the first, it were rare if any should lend money upon a mortgage, where the thing mortgaged is not of better value than the money lent; rare also that an Executor should take care to redeem with his own money that which should yield no benefit or advantage to him, or his Testator. Let us therefore scan and examine the Point, since the same may come frequently in use: and thus we may the more decently do, because the Lord Dyer in the Margin of the Case by him reported, as aforesaid, saith expressly, that the said other *temp. Henry the seventh* was not at all adjudged, himself having viewed the Roll, which he there sets down, and the names of the parties. We will therefore put the Case thus: A possessed of a Lease for sixty years of one hundred pound Land

Land mortgageth in for five hundred pound; or be it that the Mortgage or Pledge be of a Jewel or piece of Plate for half the value; and now before the day limited for payment and redemption *A*, having made *B* his Executor dieth, and *B* at the time and place maketh payment as was conditioned. Now the question is, whether this Lease, Plate, or Jewel, being worth much more than the sum for which it was mortgaged, shall be in him wholly in his own right and to his own use; or partly, if not wholly, as Executor to *A*, so as to be subject to the payment of Debts and Legacies. Here it must be clearly admitted, that *B* was enabled to this redemption only and meerly by the Condition annexed to the Mortgage or Pledging. It must also be admitted, that this Condition, and the power or interest to take benefit thereof, came to him and was derived only as Executor of *A*. This being premised, it must needs follow, (as to me it seems) that the Condition working and having his operation in the redemption to destroy the Grant, Mortgage, or Pledging, it must needs make these things again the Testator's Goods in

statu

to ~~be~~ *him*, and so to be in B as Executor; since in that right only he was intitled to take benefit of the Condition. For what is it which hindered, before this, from being the Testator's Goods? nothing certainly but only the force and strength of the Mortgage or Pledge. Now by the Redemption that is become void; and hath lost its force; therefore the property of these things must now needs be as if no such Mortgage or Pledge had been, or as if it had at the first been void and of no force. Thus must the Condition work for him who made it, *viz.* A the Testator; and those of the contrary opinion in the time of King Henry the seventh do yet say, that by this Redemption the Testator is so much indebted to the Executor as he disbursed for the Redemption; which could stand with no reason, unless by it the property and Interest should be reduced to the Testator's behoof. That thus it is, is also proved, as to me it seems, by the Case of Mortgage of Inheritance, upon which the Heir making payment, according to the Condition, is not now in as a new Purchaser, but as Heir; so

so as he shall have his Age, and be in Ward even for this Land; yea, it shall be *Asser* in his hands for satisfaction of his Father's, as other Ancestors Debts: which in some respect is a harder Case than that of the Executor; for he hath means to satisfy himself of the money disbursed, either out of the thing redeemed, or other goods of his Testator, but the Heir hath no such means. Yet it will be asked, how the Executor can be free from mischief: for if this thing redeemed be intire, as the Cup or the Lease, the whole will be taken in Execution for the Testator's Debt. To admit this, yet here is one clear way of remedy, *viz.* The Executor may before such Execution sell the thing, and so pay himself, and retain the Surplusage to the Testator's use; and the like of this is frequent in use, *viz.* for Executors to pay off the Testator's Debt with their own money, and to make themselves satisfaction out of the Testator's goods. Besides, it is not impossible that this redeem'd thing should be thus in interest parted, that answerably and proportionably to the Sum disbursed for redemption, with reference to the value of the thing redeemed, a moyety,

or third part, or three parts thereof, should be to the Executor in his own right, as his own proper Goods, and the rest in him as Executor. As *posse* that *A* and *B* were Tenants in common of such an entire Chattel: *A* maketh *B* his Executor, and dieth. Now hath *B* one moiety as Executor, and another as his own proper; and upon a Judgment against him as Executor, that moiety only which he hath as Executor must be taken in Execution. And here may be remembered, how in Execution of a Judgment, or levying of an Amerciament out of an entire Chattel of more value than the Summ to be levied, the whole is to be sold, and the Surplusage above the Debt or Amerciament is to be delivered back to the Owner. For in all this debate, we must presume the thing redeemed by the Executor to be of better value than the Summ paid, else we may easily admit the whole to the Executor.

Again, the Lease for years is not so entire a thing, I mean the Land let, but that thereof Partition may be made, yea, enforced by Action, between Joynt-tenants and Tenants in common. But here will be objected the Case of Redemption by the

The Daughter and Heir, who though she hath a Brother born after, so as now she is no longer Heir, yet she shall, as the Book saith, retain the Land redeemed from the Heir as a Perquisite or Purchase: As for this, (which I will not oppose) the Law so frameth to the favour of the Daughter, because of great mischief to her, if, being stripped of the rest of the Inheritance by the birth of a Brother, she should also lose that which her money had redeemed, without having any remedy to have her money again, or any recompence for it. But in the other Case there is no such mischief, for that the Executor may pay himself, as hath been shewed.

Now on the other side, if the Case shall be understood that the Redemption was by payment after the day, then will I easily admit that the property or interest is in the Executor to his own use; or that the Condition now having no power to reduce it back, or to operate any thing, it is rather a Re-emption than a Redemption, since it was at the Will of the Mortgagee to dispose it at his pleasure; and any Stranger, as well as the Executor, might thus have rede-

med, viz. repurchased it: therefore only Equity, and not Law, in that Case can make any part of the value *Assess* in his hands. And so also, I think, if we should admit in the other Case of payment at the day that the property of the Chattel is to the Executor as his own, and not his Testator's goods, no part of Surplusage of value can in Law be *Assess*, howsoever in Equity.

Lastly, if the Executor redeem by payment at the day with the Testator's own money or goods, none will doubt but that the thing redeemed is in him as Executor, and the money by him paid for Redemption is well Administred, the goods redeemed being of better value. But this way it makes no difference whether the whole value of the goods redeemed shall be held *Assess*, and the money paid for Redemption stand drowned therein; or that that Summ be still adjudged in the hands of the Executor as *Assess*, and only the Surplusage of the thing redeemed over and above the Summ paid for Redemption.

Things

Things accrued by Covenant or Assumption.

IF *A* Covenants with *B* to make him
a Lease of such or such Land by such a
day, and *B* dieth before the day, and
before any Lease made; now must *A*
make the Lease to the Executor of *B*,
and the Lease so made to him shall be in
him as Executor, and consequently as
Assets. This is proved by the Judge-
ment in the Case between *Chapman* and
Dalton in the late Queen's time. Yet I
confess that it is not expressed in the
Resolution of this Case that this Lease
should be *Assets*; but that the Executors
should have the Term as Executors,
which implyeth as much in my under-
standing; and the Declaration whereupon
the Defendent demurreth sets forth the
breach of that Covenant to be *inretarda-
tione executionis Testamenti*; so as the da-
mages thereupon recovered, *viz.* 330 l.
were *Assets*, and consequently also should
the Term have bin, in lieu and recompence
whereof these Damages were given. The
like Law, if *A* assume upon good consi-
deration to deliver in to *B* by such a day
20 quarters of Malt, or so many Loads of

Plow. Com.

Coals or Wood, or any other Wares or Merchandise, and this is not performed in the life of B, but after to his Executor; it shall be to him as Executor, and shall be *Affect* in his hands, as well as the money recovered in damages for not performing should have been.

Of things accrued by Remainder on Increase.

IF a Lease be made to one for Life, the Remainder to his Executors for years, and he dieth; this will be *Affect* in the hands of his Executors, though it were never in the Testator, as was in the latter end of the late Queen's time resolved by three Justices, the Lord *Anderson* only being of a contrary opinion; and there it was said that *Cranmer's Case*, wherein the contrary in effect was resolved, was of little Authority, for that there were first two Judges against two, till after *Mounson* changed his opinion, upon a conceit that there the Estate was by way of use, which could make no difference. Like Law, where a Lease for years is by Will bequeathed to A for life, and after to B, who dieth before A; although B ne-

ver had his term in him so as that he could grant or dispose it, yet shall it rest in his Executor as his Goods, and be *Affets*. As for a Remainder for years so in the Testator that he might grant or dispose it at his pleasure, no doubt can be thereof; though the same fell not in possession to the Testator in his life-time, yet no scruple nor doubt can be but that this is *Affets* to the Executor, even whilst it continues a Remainder, and before it falleth into possession, because it is presently valuable and vendible.

Nor much of other nature to these are the Cases where the Executor merchandizing with the Goods of his Testator maketh gain thereof.

11 H. 6. 35.
per Babington.

So if the Sheep, or other Cattel of the Testator do breed, viz. bear Lambs, Calves, Colts, &c. after the Testator's death, even these which were never in the Testator shall yet be *Affets*; and so the Wooll growing upon the Sheep after the Testator's death. But there is one Case worth the consideration, and worthy of some doubt, as I think, and that is this: One leaveth to the Executor a Lease for years of Land worth 20 pound by the year, and the Executor,

keeping this in his own hands one year after the Testators death, doth make thereof thirty pound in clear gain above all charges; now whether, as to a Creditor, this whole thirty pound shall be *Assets*, or only twenty pound? And the Case, simply thus put, shall be understood of an occupying and manuring without any stock of the Testator's; and then, if the Executor did stock it with his own Sheep or other Cattel, as he must have born the loss by rot or death, so is it reason that, if the Manurance prove gainfull, he reap the fruits thereof in recompence of his adventure, and of his industry, skill, and good Husbandry. But if the Testator's stock of Sheep and Cattel were (as of necessity, or for the better advantage of the Testator's Estate) continued upon the Lease-Land, then is it reason that the gain or loss, whosoever of them God sendeth, do redound to the Testator's Estate. Like Law (as I think) if an Executor, finding that he cannot instantly after the Testator's death let the Lease, I, and near the value, shall therefore buy seed-Corn, and hire the Plowing, &c. But it may be said, that the Lease hath one entire valuation at the first upon the Appraise-

Appraisement. To this I answer, first, that the value upon the Appraisement is not binding, nor much respected at the Common Law : if it be too high, it shall not prejudice the Executor; if too low, shall not advantage him : but the very value found by Jury, when it comes in question whether the Executor have fully Administred, or have *Assets* or not, is that which is binding. Next I say, that if a long Lease come to Executors of Land worth an hundred pound by the year, and no sale is made thereof by the space of a year or more ; now the term continuing of the like value as at first, it is no reason but this hundred pound raised the first year should go towards the payment of Debts and Legacies, rather than any of them should be unpay'd. These things, I mean the knowledge of them, are useful two wayes, *viz.* First, to give light to Executors, to discern what unto them of right pertains : Next, to shew unto Creditors and Legatees what, and how far, things shall be *Assets*, that is to say, Goods to enable, charge, and bind Executors to pay Debts and Legacies. For whatsoever any of these wayes cometh to the Executors from their Testator, or
is

is recovered by any of these Actions, shall be in their hands *Assens*, the cost and charges of recovering deducted.

C H A P. VII.

What manner of Interest an Executor hath in his Testator's Goods and Chattels, and how different from the Common Interest which they or others have in their own proper Goods.

THE Interest which an Executor hath (as Executor) in the Goods of his Testator is much different from the absolute, proper and ordinary Interest which every one hath in his own proper Goods, as may well appear in and by these Points. First, Although a Stranger take away these goods, the Action of Trespass for the Executor is of general form, *Quare bona sua cepit*, calling them his Goods; whereas a man outlawed in Debt, &c. or convict or attainted of Felony or Treason, forfeiteth all his own Goods, yet these which he hath as Executor shall not be forfeited. If a Villain be made Executor, his Lord cannot

24 E. 3. f. 35.

32 H. 6. 34.

not take these Goods, though he may take all the Villain's own Goods : and for taking such goods, or for a Debt due to the Testator, a Villain may sue his Lord. Nay, if the Executor grant all his goods, some good opinion hath been, that these which he hath as Executor should not pass; yea, the Lord Dyer so held in the late Queen's time, with this difference, viz. Where the Grantor is named Executor in the Grant, there the goods which he hath as Executor should pass; but otherwise, if he be not named Executor in the Grant. And that this opinion is probable, will farther appear by that which followeth.

Secondly, The Executor cannot by Will give or bequeath the Goods he hath as Executor; and if he die intestate, and Administration of all his Goods is committed to J. D. yet hath he nothing to do with the goods which the Intestate had as Executor to his Testator: Thus all his goods reacheth not to his goods as Executor.

Thirdly, Whereas a man's goods stand liable to the payment of his Debts both in his life-time and after, the goods which a man hath as Executor are not to be taken

Lit. tit. Villainage 41.
42. 10 E. 4.
f. 1. Yet
129 H. 6. f. 15.
A release of
all Actions
by an Executor
extincts Actions as Executor. But
Frowick is
against it in
26 Hen. 7.
Kel. 64.

See these so
resolved in
Pl. Com. 5.
25. inter
Bransbury
and Gran-
tham, p. 20.
Elix.

taken in Execution for his own Debts, either upon a Recognizance, Statute, or Judgment had against him. And if such a one die indebted, leaving to his Executor much goods which he had as Executor; these are not *Assets* in his hands liable to the payment of his Debts, but only for the payment of the first Testator's Debts or Legacies. Therefore a *Quo minus* brought by an Executor, shewing that he was not able to pay the King's Debt, because the Defendant detained from him an hundred pound, which he owed him as Executor to 7 s, was overthrown; for that it could not be intended, saith the Book, that the King's Debt could be satisfied with that which the Plaintiff should recover and receive as Executor. Whereas a Woman being possessed of any Chattels personal, *viz.* moveable goods, all are devolved out of her into her Husband by her Marriage, so as if he die, and she over-live, they be not her's again, but her Husband's Executors or Administrators; and if she die, all be the Husband's, without being Executor to his Wife. It is not so of the goods which she hath as Executor; these still remain in and to her, if her Husband die: and
if

if she her self die, for that she hath them as it were in another's right, viz. as she represents the person of her Testator, her Husband shall not have them, if he be not his Wife's Executor, and so Executor to her Testator.

Lastly, Whereas the Writ of Trespass seems to make no difference between one's own goods and those he hath as Executor, that being a possessory Action or Suit grounded upon the Possession, yet come to an Action of Debt, which more tastes and participates of the right, and there are they differenced; For where for my own Debt, when I sue, the Writ saith, *Debet & detinet*, viz. that the Defendent owes me and detains from me that Summ; yet when I sue as Executor, the Writ saith not *Debet*, he doth owe me, but *Detinet* only, he detains from me, as admitting that he is not Debtor to me, though he should pay me. And so where I am sued as Executor, the Writ makes me not a Debtor, but a Detainer; otherwise, where in my own right I owe, and I am sued for a Debt. Accordingly, where Judgment in an Action of Debt is given against one as Executor, it is not generally that the Plaintiff shall

This may be in his name only out of whose possession the goods were taken.

Co. l. 5. f. 31.

shall recover against him, but he shall recover of the goods of the Testator; and therefore upon this Judgment no *Capias* lieth against him, to enforce him to pay by Arrest of his Body, because he is not properly Debtor. But if after it be returned, that he hath wasted the Testator's goods out of which the said Debt should be satisfied, then, he having made himself a Debtor, a *Capias ad satisfaciendum* shall be awarded against him, and then he shall be taken in Execution. So also in some Cases of false Plea pleaded; for where the Judgement is *de bonis propriis*, the Plaintiff may have a *Capias ad satisfaciendum*, and that Judgment is in divers Cases for the Damages, although not in many for the Principal. As for the *Capias* before Judgment, in the mean Process against an Executor, that is because of his Contumacy in not appearing upon the former Process.

The reason of this different Interest between an Executor and another, or between the same man's having Goods as Executor and others in his own right, as also of the different manner of one's being indebted as Executor and otherwise in his own right, is well expressed by

by the Lord Cook in *Pinebon's Case*, viz.
First, that the Goods which one hath as
Executor he hath not in his own right,
but in *auter droit*, that is, in the right of
another, meaning his Testator. Second-
ly, that Executors are but the Ministers
and Dispensers, or Distributers, of their
Testators Goods.

Co. lib. 6. 88.
b.
See this also
Flow. Com.
5. 20. a.

*Of alteration of Property in the Executor's
hands, so as some Goods become his own,
which he had as Executor.*

TO this Head or Chapter, treating of
the difference between the Interest in
Goods as Executor, and others had meer-
ly in one's own right and to his own use,
it is not impertinent to consider how that
which one hath at the first as Executor
may be changed in Property, and become
the Executor's own to his own use, as o-
ther his Goods which he had not as Exe-
cutor. Here let us first consider of ready
money left by the Testator: for since
pieces of money, viz. shillings, groats,
pieces, and half pieces of Gold, cannot
be known one from the other, it must
needs follow, that these coming to an
Executor from the Testator, must in some
sort

sort be altered in Property, so as though the Executor shall be said to have so much in money or value, yet can it not be discerned which money in his house was his Testator's, and which his own. Consequently the Sheriff upon the *Fieri facias* for a Creditor, who hath recovered against the Executor a Debt owing by the Testator, cannot take away money in Execution as the Testator's, in my opinion. *Quære*, if thereupon a *Devastavit* shall be returned, or what shall be done.

2 El. Dy. 185
This divers
Books af-
firm,
20 H. 7. 4.
6 Kel. Rep.
59. 6 2, 3.
El. Dy. 117.
6 H. 8. Dyer
fol. 2. 2.

But what if the Testator were indebted to the Executor, or if the Executor, not having ready money of the Testator's, or otherwise, shall pay a Debt of the Testator's with his own money, what shall we say of the Conversion or Alteration of some of the goods from being his as Executor, to be his meerly in his own right? Hereof I have shewed elsewhere my conceiving, which is briefly thus; That except either he have in his hands money of the Testator's, (for of that it is easie to make a proportionable change) or unless the sum to him owing from his Testator, or by him paid for his Testator, amount to the full value of all the Testator's Goods in his hands, or do exceed

ceed the same, no Alteration can be, until some Election or Declaration by the Executor made which of the Goods not exceeding the Debt unto him, he will have to be his own: For where the Testator's goods exceed this Debt to him, the Property of all cannot be changed; and of what part shall the Law adjudge the change, till choice by the Executor? It is good therefore for him to do as the Mother-Guardian in Socage, who is to endow her self, calling her Neighbours, and expressing to them which part of the Land she will have for her Dower. So let the Executor do. But let him take heed that his Election or Declaration exceed not his Debt, lest it be void. And that such particular Election is to be made, seems to me proved by the Case of 21 h. E. fol. 21. where the payment of money, and detaining or taking of a Horse of the Testator's, is mentioned. But *Choke* there says, this cannot be done without the Ordinary's Assent. And the Reporter thinks, though the Ordinary do assent, yet the Property shall not be turned into the Executor as his own.

Flow. 554. So of a Legacy in money given to the Executor.

See 2. 3 E2. Dyer 187.

K

Another

Another Alteration is of the profits of a Lease come to the Executor from the Testator : For since no more thereof shall stand in the Executor as *Assets* than so much only as exceeds the yearly value, according to the resolution in *Hargrave's Case*, it must needs follow that the residue of the profits must be the Executor's, he paying the Rent out of his own purse ; as that Case resolves in consequence, *viz.* *Co. l. f. 31. b.* that he shall be sued for it in the *Debet*, and in the *Detinet* only as for the Rent due before the death of the Testator. Thus though he have the Lease as Executor, yet part of the profits are merely his own, not as Executor.

And looking back upon this Case, we may discern a necessity sometimes of the Executor's, paying with his own money for his Testator's Debt : as where the Testator being to pay a Rent at *Michaelmas* or our *Lady-day*, he dies a day or two before, or, to put it more clearly, a day or two after the Feast, not leaving any goods to pay the Rent, other than the future profits of the Lease. Here, unless that the Executor will forfeit the Lease, he must lay out of his own money.

Now

Now if in this and other like Cases he could not do this until he had under Seal, or by act in the Court Spiritual, an Assent of the Ordinary, it would be an extraordinary trouble to Executors.

I find also *tempore Hen. 7.* another ^{20 H. 7. 5. 4.} mean of altering Property, to wit, where a *Fieri facias* comes to the Sheriff to sell or levy a Debt of the Testator's goods; now, saith the Book, may the Executor buy these goods of the Sheriff as well as another; and if he do, the Property which he had as Executor shall be turned into a Property *in jure proprio*.

If an Executor amongst his Testator's goods find and take some not his, and after, these being claimed by the Owner, who left them in the custody of the Testator, the Executor not crediting the claim, still keeps them, and the Owner thereupon recovers damages in an Action of Trespass, or of Trover and Conversion; now (and so in all other like Cases) are these goods become the Trespassor's in property, because he hath paid for them: ^{20 H. 7. Kelw. Ca. 58.} therefore it is not strange, if in like manner an Executor, paying out of his own purse for or in lieu of the Testator's

K 2 goods,

goods, have so much of them (where no certainty) changed in property, and become his own. This is but put as an instance understood with the exceptions and cautions precedent.

CHAP. VIII.

*Of some cases and questions between the
Executor and the Heir.*

21 H. 6. 30.

If other
goods taken
among them,
he is excused

21 H. 7. 25.

Vid. lib. Inr.

640. It is so
pleaded.

THE Executor may in convenient time after the Testator's death enter into the house descended to the Heir, for the removing and taking away of the Goods, so as the door be open, or at least the Key be in the door: and this I understand of the door of each Room. For although the door of entrance into Hall and Parlour be open, the Executor cannot by that justify the breaking open of the door of any Chamber to take goods there, but only may take those in the Rooms which be open. And this is proved, as to me it seems, by the Case of the Chest with Evidences, which, saith the Book, the Executor may

may take and put out the Deeds, delivering them to the Heir, viz. the Chest being unlocked, as I understand it. Now a Chamber or other Room within a house locked is an inclosure of better respect than a Chest. But if the goods be not removed within convenient time, the Heir may distrain them as *damage feasant*.

43 E. 3. 24.

Bro. 145.

makes a

Quere. if it be

locked.

Plow. Com.

280.

Where the Testator recovers Land and damages, or a Deed and damages, he dying before Execution, the Heir shall have execution for the Land or Deed, and the Executor for the damages: but *temp. Edward. 4.* it is said, that until the Heir sue a *Scire facias*, the Executor cannot sue Execution for the damages.

43 Ed. 3. 2.

10 Ed. 4. 5, 6.

Of the Deed

Execution

first.

If a Creditor be made Executor by his Debtor, and pay himself part out of the Goods, he cannot sue the Heir for the rest, because the Debt cannot be apportioned; but otherwise he may, saith the Book: yet *Quere*, if he do take upon him the Executorship, and have goods sufficient to pay all.

12 H. 4.

If a Debt be recovered against one who dieth before Execution sued, leaving goods sufficient to satisfy; now shall not the Land descended to the Heir be charged

7 H. 4. f. 31.

See Bro. Ex.

124.

ged therewith, nor by like reason any Land conveyed after Judgment.

Co. l. 3. f. 90.
91. To like
purpose see
more, Littl.
f. 77. b. 2 El.
Dyer 281.
Plow. Com.
291.
21 H. 7. 4.

See a good difference, where Land is conveyed upon condition of payment to the Vendor, his Heirs or Assigns, and he dieth before the time, and where it is to be paid to the Vendee, his Heirs or Assigns, and he dieth: in the first Case payment shall be to the Executors, but not in the other.

What things pertain to the Heir, and what to the Executor, is before shewed. As for *Frowick's* opinion, that where goods be mortgaged upon condition, that if the Heir or Executor pay, &c. here if the Heir make payment, he should have the Goods, I see not, for my part, how that can be.

A Directory for the following Chapter.

- A. All (as but one.) represent the Testator's person, and must joyn and be joyned in Suit; & c. *contra*.
- B. Where one alone must answer Suit, and how.
- C. When they differ in Plea, the best shall be

an Executor.

be taken, but one may confess alone.

D. One, as well as all, may give Assent, or release the whole.

E. One cannot give, nor release to another, nor divide.

F. The possession of one is the possession of all, to what purpose.

G. If the Survivor die Intestate, the Testator is Intestate, though the other Executor left an Executor.

H. Executor included in the person of the Testator, and represents it, is his Assign; all one : & è contrá.

I. What change by death of the Testator, touching proceeding in Suit.

K. Proceed to or in Execution; where without Scire facias.

M. Whether the Executor stand in his own quality, or his Testator's.

N. Where one alone may sue.

O. In Suit for them, such as will not joyn shall be severed, and the other may sue and prosecute alone : Consequents indé.

P. Death of one Executor, Plaintiff or Defendant, where abates Writ.

The Office of

CHAP. IX.

*How Executors stand between themselves,
and in representation of or relation to
the Testator, as his Assignee or Depu-
ty, or as the same person with him;
and where, and to what purpose, as o-
ther persons.*

Are as one
person;
therefore
cannot plead
several Pleas
in Abate-
ment.

37 H. 6. 17.
39 H. 6. 44.
38 E. 3. 9.
Bro. Ex. 13.
Bro. Ex. 20,
21.

Therefore
one Execu-
tor sued, if
he pleads
that there is
another Ex-
ecutor not
sued, must
plead that he
did Admini-
ster.

9 H. 6. 44.
Bro. 13. 33.
H. 6. 38.
Bro. 20.
32 E. 3.
*Quid juris
clamat 5.*

First, all of them do represent the
person of the Testator, and there-
fore must they all joyn in Suit against
others, and in Suit by others they must
be all made Defendants, or at least so
many of them as do administer: for
though the Executors themselves must
take notice by the Will how ma-
ny Executors there be, and must frame
their Suit accordingly; Creditors and
Strangers need not take notice of any
more than to Administer, and exe-
cute the office of Executors. For
this reason, as I take it, in the time of
King *Edward* the third, where two Exe-
cutors were of a Term, and the Reversi-
on was granted by Fine, mentioning but
one Termor, and thereupon a *Quid juris
clamat*

clamat accordingly brought against that one Executor; this was held good enough, though the other Executor was not named in the Suit: belike, because that one (who indeed was the Testator's Wife) did only occupy the Land, and take the profits thereof; for else, since all the Executors do represent the Testator's person, all must have been named. Therefore did the Judges resolve in the time of *Hen. 4.* that where a Lessee for years made two Executors, and one of them was distrained by the Lord for Rent, who avowed upon the Lessor; that Executor should have Aid of his Fellow-executor, to the end that both might have Aid of the Lessor, which one alone could not. And upon this reason, *viz.* that the Executors represent the person of their Testator as one person, (for so speaks the Parliament) it was enacted in the time of *Edward* the third, that the Executors, though never so many, shall have but one Essoyn, either before appearance or after, because their Testator, whose person they represent, could have had no more.

It is farther also enacted by the said Statute, that where two or three Executors or more be, they being sued in an Action

13 H. 4.
aid 186.

A.

9 Ed. 3. c. 3.

A.

B.

But not if he
appear at the
summons, 1 E.

4. 1. 14 H. 4. f.

11. But the

Plaintiff

must declare

against all.

He need not,

but he may

admir ano-

ther to ap-

pear and

plead after.

7 H. 4. 12.

But Process

must be con-

tinued a-

gainst all.

7 H. 6. 35.

Executors of

Executors by

Equity.

30 H. 6. 45.

Bro. Exec.

99. 28. H. 6.

f. 4. 14 H. 4.

23, 24. So ne-

gatively.

22 H. 6. f. 1.

28 H. 6. f. 4.

3 H. 6. 35. a.

39 E. 3. 5.

There it is

not merely

as Execu-

tors; it is out

of the Stat.

11 H. 4. 63.

as if in Deb.

& det.

Action of Debt, though all do not appear, yet such one of them or more as doth or do appear at the Grand Distress, shall answer alone without his or their Companions. And this Statute hath been taken by Equity in three respects.

First, touching the Persons; that it shall extend not to Executors only, but also to Executors of Executors, yea to Administrators also; though the Stat. speak only of Executors.

Secondly, touching the Action; where- as the Stat. speaks only of the Action of Debt, it is taken by Equity to extend to other Actions, as the Writ *De rationabili parte bonorum*, and *Detinue*: yet perhaps the later Action will be said not to be maintainable against Executors for their Testator's act, but for their own only. But we are not yet come so far as to determine what is maintainable, but whether, before all the Executors do appear, he or they which have appeared shall be put to answer; and so to bring it to Decision, whether the Action be maintainable or not. I think also that in the Action of Covenant, and all other Actions against Executors as Executors, he which appeareth must

must answer without his Companions; though the greater opinion in the *Quadragesimes* were contrary touching the Action of Covenant. But as for the *Sub-pena* against the Executors, which is to make them to answer to a Suit in Equity, that hath been *Temp. E. 4.* taken to be out of the reach and intent of the Statute. So also of the *Latitat* in the *King's Bench*, as was held in the same King's time; except all the Executors, making up the whole representative body of the Testator, be in the custody of the Marshal, one or more of them who are there shall not be enforced to answer: and so was it also lately held in the *King's Bench*, where Master Justice *Houghton* gave an excellent reason that this Case is out of the said Statute, *viz.* for that this Writ doth not mention any Debt, or name the Defendant's Executors.

Thirdly and lastly, That Statute is extended by Equity to other Writs or Process: for where the Statute speaks only of the grand Distress, and the Executors appearing thereupon; it hath been many times ruled, that when he or they appear upon the Attachment, *Capias* or *Exigent*, answer must be, though the

B.
Cont. 47 E. 3.
22. So 7 E. 4.
20, 21. 3 H. 4.
20. In Sci.
fac. upon a
Pardon by a
Defendant
outlawed at
their Suit.
47 E. 3. 21.
Only Fecold
in the affir-
mative.
8 E. 4. 5.
9 E. 4. 12, 13.
 B.
20 vel 21
Jac. Regr.

B.

1 E. 4. 1.
40 E. 3. 1.

B. the rest appear not; for so the word *Di-*
 11 H. 4. 63. *stress* is taken for all compulsory means,
 C. or enforcement of Appearance. But
 Or if but one appear, 28 H. where the Statute reacheth not, *viz.*
 6. f. 364. Judgment against all. when the Process is determined against
 See 9 E. 4. one or more as by Outlawry, &c. there
 12, 13, 14. the rest must answer by the rules of the
 Where B, Common Law; except it be in the case
 who is not of Husband and Wife Executors, for
 Executor, is jointly sued with A, and there the Wife cannot answer without
 B confesseth. her Husband, nor doubtless can he with-
 21 H. 7. 25. out her, where she and not he is Exe-
 Yet 7 E. 4. 7. cutor; but where both be Executors,
 they may sever in Pleas there he may answer without her, but
 not dilatory. not she without him. When Executors
 C. as Defendants have appeared, if any one
 7 H. 6. f. 6. of them will confess the Action, this
 p. r. Cottes- binds and concludes the rest; but if
 more. If they recover, and one of them
 prays a *Cap.* one will plead one Plea, and the other
ad sat. and another, that (say some) shall be received
 the other a which is best for the Testator's state: so
Fieri fac. where they sue, such as will not prosecute
 the first, as shall be severed, and the rest without
 granted, them may proceed; and in like manner
 3 H. 4. 10. where they pray to be received to defend
 Bro. 44. their Term, and one of them after makes
 So where the the Defendant Out-
 lawed at the Suit of two
 Executors, and upon the *Seire facias* after his Pardon but one ap-
 pears, 21 H. 7. 25. 9 E. 4. 12, 14.

Default,

Default, it shall not be the Default of all ; but the rest, or he, if it be but one who appears, shall be received to uphold the defence of the Term.

Thirdly, so where they plead a Release to the Testator or themselves, one after making Default; this shall not be nor make a total Default in the Executors, to induce a Judgment or Condemnation against them. Yet in truth, each Executor hath the whole of the Testator's Goods and Chattels, be they real or personal, and each may sell or give the whole. One

²¹ E. 3. 13.

²⁷ H. 8. 21,

^{22.}

D. E.

of them cannot give nor release to the other his Interest ; and if he do, it is void, and he who releaseth shall still have as much Interest as he to whom he released, because each had the whole before. Upon this reason long since, where one of the two Executors released but his part of a Debt, it was held that the whole was discharged. And so, if one Executor grant his part of the Testator's goods, all passeth, and nothing is left to the other ; for that each hath the whole, and there be no parts or moyeties between Executors. Therefore also, though a Lease for a thousand years of a thousand Acres of Land come to two

C.

If an Horse come to four Executors, each hath an Horse, and yet all four have but one.

Exc-

- E. Executors or more, no partition or Division can be made between them, because it is not between them as between joynt Lessees of Land, where each hath but a moyety in Interest, though Possession of or through the whole. Amidst
- D. Executors each hath the whole, and therefore if he grant his part, he grants the whole. But one Executor may demise or grant the moyety of the Land for the whole term, and so may the other do; and this way they may settle in Friends or others trusted for them, a moyety for each, either in severall or undivided: but one of them cannot make a Lease to the other of any part, for he had the whole, nor can one sue the other as Executor. Yet if the Testator devise to one of his Executors all his Goods, after such Debts and Legacies satisfied, there, after those satisfied, the Executor may take the Goods, and maintain an Action of Trespass against the other Executor, if he take them from him, and consequently an Action of *Detinue*, for keeping or detaining them: but this is as Legatee, his own assent perfecting the Legacy.

6 H. 7. 5.

The possession of one Executor is the
pos.

possession of all the rest : so as if one appearing to a Suit, and the other making Default in whose hands all the goods be which are not administred, if, I say, here he that appears pleads that he hath nothing in his hands, this shall be found against him ; for whatsoever any of the Co-executors hath he also hath, and is in his possession ; and so shall the Creditor recover, and have Judgment to be satisfied out of the Testator's Goods, as in his hands. And therefore if Goods be taken from one, all may maintain an Action of Trespas thereupon ; for the possession of one is the possession of all. But the possession of one shall not be so the possession of all, as to charge the other's own Goods, whereof more elsewhere.

Where two Executors be made, the one making a Will and Executors, and dying, if the other die after intestate ; now shall not the Executor of him who first died be Executor to the first Testator, but he is dead Intestate, because the surviving Executor is so dead, and in him the Executorship was wholly and solely settled by the death of his fellow before him. So Administration *de bonis non admin.* shall be committed.

The

14 H.4.12.
Bro. 12.

F.

All must sue
19 H.6.65.
Cont. 24 E.
3.26.

It may be in
his name only
from whom taken
nor need he
be named
Executor.

Bro. Exec. 31.

19 H.6.45.
F.

G.

38 H.8.Bro.
Exec. 149.

39 H.6.45.

Co 9. lib. 5. f. 97. The Executors, or Executor, if but one, so represents the person of the Testator,

H.
Chapman, &
Dalton's
Case, Plow.

that he is in Law his Assignee by the very making of him Executor: so as if one Covenant to make a Lease to J S and his Assigns by such a time, and J S dieth before that time, and before the Lease made; now must the Lease be made to his Executors as his Assignees, representing his person: so also in a condition to pay the Feoffor or his Assignee: yet a Lease to A and his Assigns during the life of B shall not go to the Executors of A. So where in a general Pardon

Sir Edward
Piton's
Case, Co. lib.
2. f. 80.

A.
So where the
Stat. of W. 1.
gives time
for proof to
him whose
goods were
wrested, his
Executors
may do it,
if he die be-
fore the
time.

Co. 1. 5. 107.
b. Co. lib. 6.
f. 80.

by Parliament there is an exception of persons Outlawed after Judgment, the person so Outlawed shall satisfy the Creditor who hath outlawed him. If the Outlaw die before this done, his Executor, as representing his person, may make satisfaction, and so make the benefit of the Pardon to extend to his Testator, for saving his goods, as if himself had satisfied his Creditor, though he left him unsatisfied when he left the World, & *diem obiit extremum*. Yet where A sold Land to B upon *Proviso*, that if he payed to B, his Heirs or Assigns, &c. B died, A payed at the day to his Executor,

tor, and it was doubted that it was not good; for the word Assignee could not reach to him, being no Assignee of the Land. And where the Executor brought an Action of Account upon a Receipt by the hands of the Testator, the Defendant could not be admitted to wage his Law; for that this was held a Receipt *per auter mains*: yet it is clear, that if one by Bond or Covenant tie himself to pay such a sum at such a day, not mentioning his Executor at all; yet is the Executor bound, as included in the name or person of the Testator. And where the Statute 23. of Hen. 8. gives the Writ of Attaint (in the course there mentioned) against the party that had Judgment, it lieth against his Executors, if he be dead; but thereof another reason is given. Where a man was bound that he would not sue upon such a Bond, and he died, and his Executor sued; this was held to be no Forfeiture of the Bond. So where one was bound to pay ten pound within a month after request made to him, and he died before request; it sufficed not to make it to the Executor, as *Manwood* said. It was likewise held, that the Warrant of Attorney put in for the

Also Executors may have restitution for stolen goods, and a Writ of Error; yet the Statute speaks but of the party.

A.
2 El. Dy.
180. Cont.
where to A
the Feoffor,
his Heir or
Assign.
Co. lib. 5. f.
97. 2 Eliz.
Dy. 183.
101.

H.
25 H. S. 16.

M. 15 & 16
Eliz.

L

Plain-

L
34 Eliz. vii
circiter, Ti-
therly and
Lexcor.
Walsh. in
ban. Reg.

I
36 H. 8.
Bro. Stat.
Merchant
43.

K
1 R. 3. 8.
H. 1.
15 H. 7. 14.
F.
15 E. 3. Re-
spond. i. con.
upon a Stat.
Merchant.

K
Con'. Nat.
br. 267. up-
on a Recog.
I.

H
37 El. rot.
31. in ba.
Reg.

Plaintiff in Debt, it sufficeth not for his Executor to bring a *Scire facias* upon the Judgment. And if Executors sue Execution upon a Statute in the name of a Conusee, as if he were alive, this is void, and they may sue out new Extent; and this they may do without any *Scire facias*, as well as the Conusee might if he had been alive. But by *Hussey*, Justice, If the Conusor in a Statute-staple be returned dead by the Sheriff upon the Extent, a *Scire facias* must be sued out before Extent proceed; and upon a Judgment had, if the Recoverer die before Execution, his Executor cannot, as himself might, sue out Execution without a *Scire facias*, as is there said. Yet if after a *Capias ad sat.* awarded, the Plaintiff die before it be executed, the Sheriff may proceed to the taking of the party, and is not subject to any Action of false Imprisonment: nay, if he suffer him to escape, he is chargeable, as *temp. Elizabeth.* it was resolved upon the motion of *Anderson*; but withal it was held, that relief might be by *Audita Querela.*

Like Resolution was in the *King's Bench*, after some doubt by *Wray* and the other Judges, where the Defendent died after

after a *Fieri facias* awarded, and before it was executed; that the Sheriff might proceed upon the Goods in the hands of the Executors.

But if the Defendant in an Action of Debt upon a Bond, plead a Tender at the time and place of payment, and renders the money in Court, where it rests, and then he dies; now shall not the Plaintiff have this money, because the property thereof is changed, and become the Executor's, as was held in the *Common Pleas*; but he is put to a new Suit against the Executor.

Yet where Judgment is once given in a Writ of Partition for a Term, or in a Writ of Account; if the Plaintiff die before the second Judgment needful in both cases, the Executor is not put to a new Suit, but may proceed by *Scire facias* upon the former Judgment: as the *L. Anderson* held, upon the motion of *Fenner*, Serjeant. Though before we found the Executor not in points penal all one with the Testator; yet in points beneficial, the Testator includes him in some Cases: As where an Abbot granted to his Lessee to take Estovers in another's ground, it was held that his Executor, though

32 El. vel
circiter.

I.
Pasch 28;

H.

not named, should enjoy this during the term, as well as himself should have done. And whereas the Statute 23. of Henry the 8. gives Costs to a Defendant against a Plaintiff suing for a wrong, or breach of promise, or the like, done to the Plaintiff, against whom it passeth by Verdict or Non-suit; it hath been resolved, that an Executor suing upon such wrong, or breach of Contract to his Testator made, should not pay Costs, because he is another person than the Testator; and so is it usual in experience. But if in Suit the Attorney of the Executor misbehave himself towards him, and for this the Executor sueth him, here, if it pass against him in manner as aforesaid, he shall pay Costs; because this was a Suit for a wrong done to himself.

*Trin. 36 El.
in ba. Reg.
H. M.*

*Pa. 41 Eliz.
in com. ba.*

*H.
28 H. 8.*

If *A* recover a Debt as Executor of *J S*, and makes *B* his Executor, and dies before Execution sued; *B* is not put to new Suit, but may have Execution upon that Judgment. But if *A* or *B* died Intestate, now could none as Administrator to either of them, nor as Administrator of *J S*, have Execution of this Judgment; for the former hath no interest
in

In any thing pertaining, to *J S*, and the latter cometh to Title above the Judgment, *viz.* as immediate Administrator to *J S*, who is now dead Intestate, and derives no Title from the Executor who recovered.

If a Conusee have a Certificate into the *Chancery* upon a Statute, and then dies before Extent taken out; his Executor is put to a new Certificate, and for obtaining of it must make *Affda-*^{2 El. Dy.}_{vis.} *vit* that no Extent hath yet been taken out. I.

If an Alien joyn with his Wife who is Executor in a Suit for Debt, and it cometh to Issue, he shall not have Tryal *per medietatem alienig.* or *Lingue*, as should be if he otherwise were party to a Tryal; as was held in the Case of Doctor *Julio*. Yet if a Nobleman sue as Executor to another not noble, he shall for his Non-suit be amerced five pound, as if he sued in his own right; as was conceived 21 E. 4. 77. By the same rule and reason, doubtless, a Nobleman sued as Executor shall not be arrested, nor shall any *Capias* be awarded against him for not appearing. And if any Trial shall be of any Issue, there shall be two Knights

M.

of the Jury, as in other Cases where a Peer is party. Likewise where the Wife is to have her convenient Apparel, whereof the Executor must not bereave her; if she be a Noble-woman, it shall be answerable to her degree.

A.
38 E. 2. fo. 9.
N. If one Executor only sell Goods of the Testator, he alone may maintain an Action of Debt for the money. So if Goods be taken out of the possession of one Executor, he alone may maintain an Action, and that without naming himself Executor.

R.
O.
3 H. 7.
I.
5 E. 2.
Fitz. pro
802. Co. 1.
38 E. 3. 13.
20 E. 3.
111. Account
78.
Some touch hath been before of Summons and Severance, whereabout be this added: If one Executor will not or cannot conjoyn in Suit with the other, so as he is summoned and severed; now by his death after the Suit is not abated, 16 Ed. 2. Fitz. 111. Yet if he live till Judgment, he may sue Execution, say other Books, 13 Ed. 3. Fitz. Exec. 9. 11 R. 2. Privilege 2. Yet Quar. of that, for he cannot acknowledge satisfaction, as hath been since resolved. Mich. 14 and 15. Eliz. Dy. 319. And the reason thereof being, because he is no party to the Judgment, by the same reason can he not sue Execution upon it; for how can he

he have Execution, for whom there is no Judgment given? now the Recovery is only in the name of the other Executor. Yea, by the said last Book it seems that after Judgment had he cannot release the Debt, because it is now altered in nature, and turned *in rem judicatam*; though at any time before Judgment he might have released it, as both that last Book saith, and the two precedent, *temp. Ed. 3. Ricb. 2.* Yea, in an Action of Account, after Judgment had that the Defendent shall account, the Release of him severed is a good Discharge to the Defendent; as was resolved 48 *Ed. 3. 14, 15.* But this is not a plenary Judgment, for nothing is recovered thereby; but another Judgment is to be had after the Account, which may be against the Plaintiff, so as this Release came before any Debt or Duty adjudged. What if the Defendent be had in Execution at the Suit of the Executor, who prosecutes it and escapeth? whether may the severed Executor discharge the Sheriff or Goaler by a Release? I think he may not.

By that above it is plain, that if any one of the Executors Plaintiffs die, the

Writ is abated ; only where he so dying
 2 H. 4. f. 14. was before severed, Opinions have been
 different, as above appears. So also is
 it if one of the Defendants Executors
 die. Yea, if the Plaintiff Creditor sue
 A, B, and C, as Executors, where only
 A and B are Executors, there by the
 death of C the Writ abates, or falls to
 the ground : yet A and B (as I think)
 might have pleaded in Abatement, that
 they only were Executors, traversing
 that C was not Executor : but the Book
 doth not so resolve. See 46 Eliz. 3. fol.
 9, 10.

As A and B above might admit that
 Writ against them and C ; so if the Writ
 or Suit had been against A only, and he
 so admit it, not pleading in Abatement,
 the Recovery against him alone is good,
 9 E. 4. 12.

21 H. 6. 30. One that is Out-lawed, or Attainted in
 M. his own person, may yet sue as Executor,
 21 E. 4. 49. because this Suit is in another's right, viz.
 69. 42 E. 4. the Testator's : But he that is Excommu-
 13. 14 H. 6. nicate cannot proceed in Suit as Execu-
 14. 15. tor, because none can converse with him
 without being excommunicate, as a Book
 says. Yet doth not this Excommuni-
 cation pleaded abate or overthrow the
 Suit,

Suit, but make that the Defendent may stay from answering his Suit untill the Plaintiff be absolved and discharged from his Excommunication.

3 H. 6. 40.
Littl. 44.
Co.J. 81. 69.
11 R. 2.
Excom. 25.

FH

CHAP. X.

MUSEVM
BRITANNICVM

Of the Possession of Executors, or their actual Having.

1. *What shall be said so to come to their hands as to charge them.*
2. *What shall be such a getting or going from them as to excuse them.*

WE have before considered what things shall come to Executors, and, being come, shall be *Assets* in their hands. Now, for that it is said in *Reede's Case*, that an Executor shall not be charged with or in respect of any other goods than those which come to his hands after his taking upon him the charge of the Executorship; let us now examine what shall be said and accounted such a full and compleat coming to the hands of Executors, as shall make them within the reach

Co. lib. 5.

reach and charge of Creditors and Legatees, viz. for the payment of Debts and Legacies. As touching Debts due to the Testator, it hath before been shewed, that until Judgment and Execution had they be not *Assets* in the Executor's hands. Now then as touching other Goods or Chattels possessory, which are of two kinds, viz. real and personal, let us put the case thus.

The Testator at the time of his death hath a flock of Sheep in *Cumberland*, Corn in the Barn in *Cornwall*, Bullocks in *Wales*, fat Oxen in *Buckshire*, Money, Household-stuff and Plate in *London*, a Lease for years in *Norfolk*, and his Executor dwells at *Coventry*, viz. far from all these places; what kind of Possession shall the Law judge this Executor to have in every of these instantly upon the Testator's death, and before he come where any of the things be, either to see or seise upon them? In all the particulars above mentioned the Law is all one, except the Case of the Lease for years; which if it be of Land, (as is most usual) then, because it is a settled and immoveable thing, the Law doth not reach to it the foot of the Executor, to put

put him in actual possession, (for *Possessio est quasi pedis positio*) until himself or some for him do actually enter thereupon. Nor indeed need the Law help or supply the want of actual possession in this Case, as in the case of Moveables; since Land cannot be carried away as Goods may, and therefore is not subject to purloining or imbecilment as Moveables are. But if the Lease for years were of Tithes, the Executor, though in never so remote a place from them, shall be instantly upon the setting out thereof in actual possession of them, so as he may maintain an Action of Trespass against any Stranger which shall take the Tithes set out, though he nor any for him did ever before possess any of the said Tithes, or came near unto them. But if the Case were of a Lease for years of a Rectory, consisting not only of Tithes, but also of Glebe-lands, into which Entry may be made, as also Livery of seisin in it; then it may perhaps be some question, whether such an actual possession in Tithes shall be given by the Law to an Executor neglecting to enter, or not entering into the Glebe-land. And so I leave the consideration of Chattels real.

45 E. 3. 17.

21 H. 6. 43.

Touch-

9 E. 4. 50.

Plow. Com.

281.

32 H. 6. 13.

14 H. 8. 22.

Touching things Personal, in which the Executor hath such an actual possession presently upon the Testator's death, as that he may maintain an Action of Trespass against any Stranger taking them away, or spoiling them, though he nor any for him ever came near them; whether yet this shall be such a possession in the Executors, and such a coming of these Goods to their hands, as to charge them with payment of Debts and Legacies, yea to make their own Goods liable instead of these, is a Point worthy of consideration.

And, doubtless, this thoroughly sifted will prove a Case mischievous, whether way soever the Law be taken. For first, it must be admitted, that without the Executor's laying his hands actually and particularly upon the Goods in the House or Fields of the Testator, whether the Executor hath resorted, he shall be said so in possession as to stand liable unto the Creditors, so far as they extend in value, though after others purloyn or imbecil them. Now then, if distance of place shall make difference, where shall be the bound and limit of that distance? and if the Executor may come after

after a stranger's taking or possessing of the goods, it is mischievous to Creditors.

On the other side, if it shall be laid upon the Executors to answer for all the Goods whereof the Testator died possessed, it will be mischievous for them, and deter them from taking Executorship upon them; since much purloyning may be even of Money, Jewels and Goods, by Servants and others about the Testator, or where these things be. I think therefore, that if without any fraud, collusion, or voluntary conniving on the part of the Executors, they be prevented by others of laying hold on the Testator's Goods; so as that they may dispose of them, especially if it cannot be known by whom they are so purloyned and imbecilled, or if they be persons fled or insolvent; that then they shall not stand upon their score, as Goods come to their hands, in respect whereof Creditors or Legatees shall draw so much from them even out of their own Goods, as in other Cases where they have no such excuse.

And of this mind I the rather am, because I find the whole Realm in Parliament

13 H. 6. c. 1. liament taking notice of such prevention of Executors coming to the Goods of their Testator, by the wrongful act and imbecilment of others, without any default in themselves. And in this Case the Parliament hath given special remedy, viz. that Writs shall be directed to Sheriffs, to make open Proclamation for the appearance of the parties delinquent in the *King's Bench* at the day limited; and in default thereof they shall be attainted there of Felony, the Writ being returned executed, viz. Proclamation made. But note, that this Proclamation is to be made two Market dayes, within twelve days next after the delivery of the Writ, and the last Proclamation must be fifteen days before the day of Appearance. And these Proclamations must be made in such Cities, Boroughs, or Places, (saith the Statute) not expressing what is meant by the word *such*, and therefore meaning doubtless those in which the act of offence is committed. So that if the fact be not committed within the limits of some City, Borough, or Market-Town, no remedy is to be had by the Statute; for that the Proclamation is to be made upon Market-days in the place where,

&c.

¶ *etc.* Now besides other Places, even some Boroughs, *viz.* Towns sending Burgesſes to the Parliament, have no Markets, and ſo are no places within the Act. Alſo two Executors muſt require this Writ; therefore where there is but one Executor, no relief is given by this Law, for it is penal, making Felony, and therefore ſhall not be extended by equity beyond the words. Laſtly, it extends but to the Executors of Lords and perſons of good Degree, and only to the treſpaſſing Servants of ſuch perſons, not to other Strangers, purloyning the goods. But now who ſhall be ſaid to be perſons of good Degree, not being Lords, I will not much labour to decide; the rather, becauſe I have not heard nor read, to my remembrance, of any Action brought upon this Statute: but I think that good Degree muſt ſtay either at a Knight, being the loweſt Dignity, or at a Gentleman, being a degree of Worſhip, as elſewhere is ſhewed, and not ſtoop any lower.

And the ſaid Statute ſeems in ſome ſort to imply an opinion this way which I incline to, in that it expreſſeth this purloyning to be an impediment of the Execution

cution of the Will, whereas if the Executors shall answer and make good to Creditors and Legatees out of their own state and goods, for these imbefilled, the Execution of the Will is not hindered, but the Executors are damnified in their own private value. Yet it may be said, on the other side, that some things given *in specie* by the Will, such a piece of Plate, such a furniture of a Bed or Chamber, such a Jewel, may be purloyned, so that the Legatees can never have them, and consequently, the Execution of the Will be hindered, though some recompence be made by the Executors: but how these Legatees shall recover recompence in such Cases, for that Legacies are not to be recovered by Suit at the Common Law, I must leave to the Professors of the Common or Civil Law to inform. But if the Executor be of secret assent to this imbefilment, whereof even the forbearance to sue for the recovery of the things, or the value of them in damages, if known where they or the imbefillers be, is a shrewd evidence, or proof; then shall the Executor be adjudged an haver of them, and so stand charged as having them: for *Pro possessore habetur qui dolo*

dolo defuit possidere. And if in any Case the taker by prevention from the Executor, before his knowledge (perhaps) of the Testator's death, or, at least, before his possibility of repair to the place where the goods were, to put them in sure custody, if, I say, such Actor keep these goods from falling upon the shoulders of the Executor, they shall surely fall upon himself, and make him chargeable at the Creditor's Suit, as an Executor of his own wrong.

Of Goods lost by, or gotten from Executors.

But put we the case (for thereunto shall be our next step) that Goods come fully into Executors possession and hands, but be again lost or gotten from them without any default in them, shall they yet stand answerable out of their own Estates for them? Surely hereabout two distinctions must be made, as I take it.

The first whereof I derive from our Learning touching Escapes of persons taken in Execution and imprisoned, if such ^{33 H. 6. 4.} be rescued by Alien enemies, the Sheriff or Goaler shall not answer out of ^{10 E. 4. 24.} his own goods for this Debt; otherwise, ^{7 Eliz. Dyer} 241.

M

if

if it be done by Subjects, against whom remedy is to be had by the course of Justice: and so should I think it to be touching Executors, *viz.* That if enemies landing (as near the Sea-coast may easily and often happen) shall take away Cattel or Goods from an Executor, hereby he shall be excused; contrariwise ordinarily, if the creption or direption be by Subjects known, and thereby actionable. Another difference I shall think may probably be taken from the rules of our Learning touching Bailment. If *A* deliver Goods to *B* to keep

Vide 29 Aff.

p. 28. 8 E. 2.

Fitz. Detin.

59. 9 E. 4.

90. 13 H. 7.

4. Co. lib. 4.

f. l. 83, 84.

as his own, or generally, *viz.* without any special undertaking by *B*, to keep them safely, and without any money or other valuable consideration given for the safe custody: here, if *B* be robbed of them, he shall not make satisfaction to *A* for them: and so if they be stoll'n from a Servant or Factor. But if they be taken away by a known Trespasser, not feloniously, some opinion hath been that the Keeper shall make recompence, because he hath remedy for recompence, or satisfaction from the Trespasser. Yet of this latter I should doubt, because *A* himself as well as *B* may have this Action

on

on for damages against the Trespasser. Now an Executor is of the nature of such an one, having the custody of another man's goods; and I have seen in a Manuscript entire, the Writ of Trespass by the Executor, expressing goods of the Testator in the custody of the Executor to be taken from him: therefore methinks he should no otherwise be charged than he, to whom goods were, as above is said, delivered to be kept. For the Executor haply shall have no benefit nor advantage by the Executorship: all the Goods not sufficing, perhaps, to pay Debts and Legacies, which is the state we most think of, viz. where goods want to pay Debts and Legacies; for where there wants not, the question needs not be made. Yet a Servant or Factor, who hath Wages for his Service, is not thereby made liable to satisfy for things in his custody stoll'n, because he hath not for this particular custody any compensation. So of an Executor, if perhaps benefit might accrue to him by the Executorship, as haply the discharge of a Debt owing by himself, &c. Other Cases there be wherein the Executor will stand more clearly discharged. As

*In custodia
sua existit;*

If the Testator left a Lease for years, state by Extent, Wardship, or other Goods, whereof he hath but a defeasible Title, and they be evicted after his death: so if he left a Ship at the Sea with much Goods and Merchandises, which are drowned in the return, never arriving in safety: so also if he left a flock of Sheep tainted with the rot, which die shortly after him: In none of these three Cases, doubts shall the loss fall upon the Executor. But to put a Case of more doubt; What if a Lease for years come to an Executor subject to a Condition for payment of Rent, or a sum in gross, and the Executor fails in payment; whether shall this loss fall upon the Executor to be made good to Creditors or Legatees out of his own substance or not?

To this I must answer by this distinction, viz. If the Executor had taken the profits of this Land so long as to furnish him with money for this payment, or if he had other goods of his Testator's in his hands to supply the payment, then is it his default that the money is not paid, and he must bear the smart thereof, otherwise not; for he is not bound to make payment out of his own goods: yet he is
a ful-

a fullen and unkind Executor who will not so do, whenas he may repay and satisfie himself by the profits thereof after. Yet *Querr.* Like Law, if the Executor suffer a Bond of a hundred pound to be forfeit for not paying of fifty pound, having sufficient in his hands. So also of a Recognizance, Statute or Judgment, defaultized upon payment of a less sum. Yea, I less doubt of all these cases, than of the Forfeiture of the Lease for years: for haply the Executor had time to have sold the Lease, and made money thereof, towards the payment of Debts; the omission and neglect whereof may be imputed unto him, as a Default justly occasioning recompence to be by the Law required from him. But, perhaps, he may excuse himself that he could not find a Chapman who would give him to the value thereof. Hereunto yet reason can easily reply, that it had been much better to have sold it under the value, than to have lost the whole value, by exposing or abandoning it to a total Forfeiture.

CHAP. XI.

*How far and where an Executor, having
Assets, is chargeable or liable to Action.*

HAVING considered what things shall come to Executors, and be *Assets* in their hands for the performance of the Will; let us now consider what things the Executor is bound to pay, satisfy, or perform, and what not, where he is chargeable, and where not, this being admitted, that he hath *Assets*, viz. sufficient wherewith to perform.

Here we will consider of these parts.

1. Of Debts by Specialty or Record.
2. Of Debts or Duties by Contract without Specialty.
3. Debts without either Contract or Specialty.
4. Covenants by Deed or Specialty.
5. Wrongs done by the Testators.

TOUCHING Debts by Specialty, which are the most usual and common oblige-

obligements, it will not be impertinent to give a little light touching the validity of a Specialty, and the extent of it to Executors. The most doubt will arise upon Bills and such Writings Obligatory made, not by Scriveners or Clerks, in common form, but by others otherwise, for haste, or through simplicity. Thus, long since we find a Writing made by *A* to *B*, *Memorand.* that I have received of *B* ten pound, which I promise to pay, &c. This being sealed and delivered, was held a good Obligation by *Brian* and *Catesb.* So if the words had been only, I shall pay to *B* ten pound; whether such words, or the like, as covenant or grant to pay, be in the form of a Bill or Bond, or in an Indenture or Articles, it is a sufficient ground for an Action of Debt. And though it should be mis-written, *Vigint* for *Vigint*, or fifteen for fifteen; yet shall it be favourably construed, and held a good Specialty of Debt, as hath been resolved in these and like Cases, and so also notwithstanding false *Latine* in the Obligation, or the plural number for the singular number, or words of repugnancy or non-sence; yet if there be words whereby it appears

22 E. 4. 22.

19 R. 2. F.
Det. 166.

9 H. 6. 7.

2 H. 4. 8.

23 El. M. 5.

9 H. 7. 16.

2 H. 4. 8.

that *A* is a Debtor to *B*, and it be sealed
 and delivered, it is a good Writing Obliga-
 tory; yea, though it want the words of
 conclusion, *viz.* In witness whereof, as
 the Lord Dyer reports to have been re-
 solved: although the contrary were held
 in four several Kings times before, as our
 Books shew.

Now any such Writing obligatory
 doth determine or drown any Duty by
 Contract, because Specialty is of a higher
 nature. So as if *A* and *B* do bargain with
C to pay him a hundred pound for Corn,
 or other thing, and after *C* take some such
 Writing obligatory as aforesaid of *A*,
 now by this is *B* discharged of the Debt,
 because he stood charged only by the
 Contract, which is extinguished by the
 said Specialty.

As for the extent and operation of
 these Specialties to and upon Execu-
 tors, we must know that an Executor
 doth so represent the person of that Tes-
 tator, and is so included in him, as that
 every Bond or Covenant by the Testator,
 made for payment of money or the like,
 reacheth to the Executor, although he
 be not named, *viz.* that he doth not
 Covenant for, nor bind him and his

Ex-

So reserva-
 tion of Rent,
 grant of
 Annuity.

28 H. 8.

Dy. 14. &

22.

47 E. 3. 22.

32 H. 6. 32.

40 H. 7. 18.

Executors by exprefs words, (and yet the Heir not named is not bound, though there be never so great *Assets* or Land descend unto him. No mention of Executor in the Judgment, yet he charged.

Now touching Debts upon Record much need not to be said, (except of those by Stat. Merchant:) for to Debts and Damages already recovered against the Testator, and to Debts by Recognizance, the Executor's liableness is somewhat clear and conspicuous. Yet other inferior Debts upon Record may fitly be thought of, as Issues forfeited, Fines imposed by Justices at *Westm.* or at *Affises*, Quarter-Sessions, Commissions of Sewers, or Bankrupts, by Stewards in Leets, or the like; for all these are Debts of Record, which Executors stand charged withal. So also if the Testator were before Auditors found in Arrerages of Account, being a Bailiff or Receiver; for these Auditors are by Statute Judges of Record: but if the Account were made only before the party to whom the Arrerage pertained, or but before one Auditor only, it is out of the Statute, which speaks of Accounts before Auditors in the plural number; therefore the Executor not chargeable, because the

9 H. 6. f. 11.

11 H. 4. 64.

92. Other-

wife of a

Guardian in

Socage, he

is out of the

Stat. W.

2 cap. 11.

ut credo. Co.

l. 10. 103.

the Testator might wage his Law in those Cases, not in the former.

36 H. 8. Br.
Stat. Mer.
43.

And whereas exception was before made of a Debt by Statute-Merchant, it was by reason that the Lord *Brook* tells us, that if the Conusor in that Case be returned dead, no remedy appeareth for the Conussee to have Execution of the goods of the Conusor, but only of his Lands. If this should be thus, it were a very mischievous Case : for many bound in Statutes have no Lands but Leases, and goods of great value, and if by their death their Goods and Chattels should be set free from this Statute, and the Creditor without remedy, the Law were defective : and it were so much the more strange in this Case, because the Statutes of *Acton Burnell* and *Mercatoribus* seem to pitch principally upon Goods, and to tend unto assurance between Merchants, who usually are not Landed men. But that the Law doth give remedy in such Case, as well against the Goods as Lands of the deceased Conusor, appears by the Resolution of late made, in what Order and Precedence Statutes are to be satisfied by Executors, as after we shall see.

Of

Of Debts by Contract without Deed, as
Leasehold, &c.

Contracts are of divers kinds, and we will begin with those in the reality as most worthy. If therefore one be Lessee for years or for life, without any Indenture or Deed, (as he may be) and, his Rent being behind, he dieth; now is the Executor liable to the payment of this Rent without any Specialty, for that his Testator, if he had been sued in his life-time, could not have Waged his Law. But if the Lessee for years in his life-time sell or grant away his Term or Lease, although he still lie at the stake for the Rent to grow due after, until the Lessor accept the Assignee for his Tenant; yet if the Lessee die, his Executor shall not be charged for any Rent due after the death of his Testator. But what if the Lessee do not alien or assign his Term, but die thereof possessed, and the Executor, perceiving the Land not to be worth the Rent, waveth the same, yet the Lessor will not enter thereinto, nor intermeddle therewith, whether may he yet charge the Executor with the Rent

21 H. 6. r.
44 E. 3. 42.

44 E. 3. 5.
7 E. 3. 11.
14 H. 7. 4.
per Koble.
Vide 8 E.
Dy. 247.

M. 32. &
33 Eliz. in
com. ba.

Do. & Stud.
121.

Rent during the Term? I answer, that if he have *Assets*, that is, sufficient for payment of this and other Debts, he cannot wave this Lease, but shall be tied to answer this Rent, though much more than the Land is worth, for the taking of the Lease is much of the nature of an Obligation to pay money: Yet because it is yearly Executory, the Executor may wave it, in case his Testator's Estate will not supply and bear that loss. But what if there be *Assets* to bear this yearly loss for some years, but not during the whole term? I think in this case the Executor must pay the Rent so long as these *Assets* will hold out, and then must wave the possession, giving notice to the Reversioner. And this I think he may do well enough, notwithstanding his Occupation of the Land divers years after the Testator's death, because that was not voluntary, but as of necessity: yet this I leave as a *Quere*, to be well advised of with good counsel.

Of Contracts personal.

WHere the Testator might wage his Law, there the Action lieth not against

against the Executor, as hath been touch-
ed: and therefore he is not chargeable
in an Action of Debt upon a simple
Contract, as by reason of this or that, to
his Testator; yea, though it were the In-
heritance of Land which was sold, so as
the Sale were without Deed; or though
by Deed, yet if no Counterpart were un-
der the hand of him to whom the Sale
was made. And the Custom of London
to the contrary, *viz.* that an Action of
Debt should be maintained against Execu-
tors upon a Contract, was held void, at
least no good Plea against other Credi-
tors, that such a Debt was recovered against
the Executor, or paid by him; as was to-
wards the latter end of the late Queens
time resolved, though in the beginning of
her time it was a Demurrer. Yea, though
such a Debt grew for the most necessary
thing, *viz.* meat and drink, which bind-
eth even an Infant to payment, yet will it
not charge the Executor of a man of full
age. But this is meant where the Con-
tract was only by word: for where the
Testator putteth his Seal to any Deed or
Writing made upon such Sale, this is more
than a simple Contract, & taketh from the
Vendee his wager of Law, and so chargeth
the

41 E. 3. f. 13.
15 E. 4. 29.
Except by a
290 minus
in the Ex-
chequer. So
the Dug's
Debter. 62
l. 9. f. 98. 4.
So of Ac-
counts, ex-
cept for the
King.

M. 32 &
33 El. in
com. ba. by
three Judg-
es, and 37
Eli. by all,
as I find in
my Report.
But Co. l. 5.
f. 82. b. it is
contrarily
reported.
3 El. Dy.
196. De-
murrer.
9 E. 4. 57.
10. H. 7. 8.
15. E. 4. 16.
22 H. 6. 13.
39 H. 6. 186.

There
though a
common
Hostler or
Vicualler
trust his
Guest, he lo-
seth his Debt
by his death.
Co. 9. 87. b.
28 H. 4. 23.
But if the
sum be also
written on
it, they are
bound as by
a Deed.
28 H. 8.
Dy. 2. a.
Stade's Case.
Co. lib. 4.
Co. l. 9. 87.
Pinchon's
Case.

2 H. 4. 14.

the Executor. But if the Testator seal but unto a Tail or Tally with scotches, expressing a Debt, this is no such Specialty as shall charge Executors. Yet in some Cases without any Seal at all the Executor is chargeable. But although no Action of Debt lieth against the Executor upon such a simple Contract, yet may the Creditor in that case maintain an Action upon the Case, grounded upon the Assumption implied, though not expressed, as now standeth resolved by all the Judges of all the Courts at *Westminster*, though heretofore there hath been much difference of opinion thereabout. And indeed, thus the Executor is charged in matter for a simple Contract, though not in manner of a Debt, but as for breach of promise, making recompence in Damages, in stead of the Debt. And the chief reason for it is, because the Testator could not have waged his Law in this Action upon the Case against himself, though in Debt he might. Where the Testator retaineth Servants in Husbandry, or otherwise, and dieth, there being Wages due to these so retained; the Executor is liable to an Action of Debt for the same,
by

by reason that the parties were compellable by Statute thus to serve, and therefore the Testator could not have waged his Law: but in case of Servants not compellable, as Waiters or Serving-men, as we call them, no Action of Debt lieth against the Executor for their wages, though against the Testator himself it doth; for the Contract is sufficient to charge him who made it. See of *Account* after.

4 H. 4. 13. 14
Acc. T. 100.
21. 927.
pl. 1. 1/4.

So 2 H. 4. f.
14. Servitors
in the War
by Contract.

*Where Executors shall be charged, without
either Contract or Specialty.*

VV Here a Prisoner oweth money to a Gaoler or Keeper of Prison for his Diet or Victuals, and dieth, his Executors shall be chargeable for this Debt, because it is for the Commonwealth to have Prisoners kept, which cannot be without affording them Victuals. Also where one hath a Patent or Tally of the Exchequer, to receive money of some Customer, Receiver, or other Officer of the Crown, and delivereth it to him, he then having money of the King's in his hands: if he pay not the same, but die, his Executors shall stand charged.

27 H. 6. 4.
15 E. 4. 16.
Co. lib. 9. f.
87 b.
No. 2. br.
121. a. He
must have a
Liberate
also

27 H. 6. 4. b. chargeable with the payment thereof. So
 1 H. 7. 17. for Arrerages of Account before Audi-
 2 H. 7. 3. b. tors, if more than one; but this is Debt
 Clark of the Hamper.
 10 H. 6. 24, of Record in Law.

35.

No. na. br.

82, 83.

Westmin. 1.

c. 35.

Lib. Intr.

172. b.

So, if any Lord of free Tenants doth
 levy Aid of them for the marriage of his
 eldest Daughter, and he die before she
 be married; she may recover this money
 by an Action of Debt against his Execu-
 tor: but this is by virtue of a Statute. There
 is a President in the Book of Entries, of
 an Action of Debt against the Executor of
 an Heir, by which it seems that a man
 binding himself and his Heirs, and lea-
 ving *Assets*, the Heir taking the profit
 becomes so a Debtor, that his Executor
 shall be charged. And in the Register
 there is a Writ against the Executors of
 the Guardian of the Spiritualities of the
 Arch-bishop of York, for the Debt of
 B, who died Intestate, and whose
 Goods came to the hand of the said
 Guardian, *viz.* the Dean of York. In
 allowance whereof, there is a Note ad-
 ded of the like Writ brought in K. R. 2.
 his time, and that then a President was
 alledged of such a Writ in King *Edw.* 2.
 his time against the Executors of an
 Ordinary, and that they were enforced
 to

Reg. orig.

141.

11 R. 2. 16.

P. 26

to answer unto it. So is the opinion of
Tren, in the time of Edward the third.
But Ald. opposeth him. Also the Ratio
habili parte bonorum by custome in some
places is maintainable for the Wife and
Children against the Executor. But no
Action of Account lieth against Execu-
tors, except for the King. More hercof
in. Wrong.

Of Covenants charging Executors.

WE have already touched upon Co-
venants in part, viz. where they
be expressly for payment of money, shew-
ing them to be in Law, bonds, that is
Writings Obligatory, whereupon an A-
ction of Debt may be brought as well as
an Action of Covenant, though the words
of the Deed bear the sound and phrase of
a Covenant. Yet in some Cases no Action
of Debt lieth upon a Covenant to pay
money: as if A covenant that his Execu-
tor shall within a year, or such a time, af-
ter his death pay ten pound to B; now
for that no Action of Debt was main-
tainable against A himself, it lieth not
against his Executor, but only an Action
of Covenant; as was held in the late

N

Queen's

11. E. 4. Fil.
Ex. 77.

Sec. Co. 116.

Int. 564.

Such Actions
in Yorkshire.

Int. 564.

Int. 564.

Int. 564.

Int. 564.

Int. 564.

Int. 564.

Int. 564.

Int. 564.

Int. 564.

Int. 564.

Int. 564.

Int. 564.

Int. 564.

Int. 564.

Int. 564.

Int. 564.

Int. 564.

Int. 564.

Int. 564.

Int. 564.

Int. 564.

Int. 564.

Int. 564.

Int. 564.

Int. 564.

Int. 564.

Int. 564.

Int. 564.

Int. 564.

Int. 564.

Int. 564.

Int. 564.

Int. 564.

Int. 564.

Int. 564.

Int. 564.

Int. 564.

Int. 564.

Int. 564.

Int. 564.

Int. 564.

Int. 564.

2g. If both
be to be
done by the
Covenantor,
viz. ten l.
if not five,
such a day.
So in *Penor's*
Case. But
where the
Lessor did
covenant to
pay the
Quit-rent,
divers Justices
thought
the Executor,
not named,
was
not bound,
1 & 2 P. &
M. Dyer.
114. Note
the Case is
supra in
Marg. Pasch.
38 El. in
ba. r g.

Queen's time. So, if the Covenant be conditional, as thus, that if *C* do not pay to *B* ten pound, then *A* will pay it: and so also, perhaps, if the Covenant be in the disjunctive, *viz.* to do such an act, or to pay ten pound: now if the Act be not done, yet no Action of Debt lieth for the money, but only an Action of Covenant. But now let us come to the Cases of meer Covenants, and see which of them will charge an Executor, and which not. If a Lessee for years covenants to repair the Buildings, or to pay the Quit-rents issuing out of the Land let, there is little doubt but the Executor, to whom the Term cometh, must as well as his Testator perform that Covenant, although he did not covenant for him and his Executors. And yet of these Cases doubt hath been: and touching the latter, *viz.* of paying Quit-rents, divers Justices in Queen Mary's time were of opinion, that it was a thing so personal, that it died with the person, and did not charge the Executors; nor is there any contrary Opinion expressed in the Book. And since that time, *viz.* towards the end of Queen Elizabeth's Reign, in the Action of Covenant between the Dean and Canons of *Windsor* and

and *Hide* touching Reparations, at the first much opinion was, that only the person Covenanting was tied to this performance; but after it was resolved, that that Covenant did run with the Estate, and so both Executor & Assignee were bound to performance. But in that Case it was said by *Popham*, Chief Justice, that if the Covenant had been to do a Collateral Act, neither the Executor nor the Assignee had been tied thereby: and therefore where a Lessee for years covenants within such a time to build a new House upon the Land, and dies before that time expired, I doubt whether the Executor be bound to perform this or not; although it do concern the Land let, so as perhaps the Rent or Fine was the less, in respect of this charge of new Structure or Buildings; which is a great reason that the Executor, though not named, should be tied to the performance. But if the Covenant had been to build a House elsewhere than upon the Land let, or to do any other collateral thing, not pertinent to the Land let; it is clear the Executors were not bound to perform it. And yet in those Cases, if there were a breach or non-performance in the Testator's life-time,

Col. 5. f. 24.

Resolved
P. 39 *Eliz.*
but not ad-
judged till
M. 43 & 44
Eliz.

Tr. 28 H. 8.
Dyer 14.
There the
House was
to be built
upon the
Land leased;
and yet Bal-
dus seemed
of a contra-
ry opinion.

M. 8 & 9
El. Dy. 257.
Intrat. M. 7.
47 8 Eliz.
Swanno.
Vest.
Strangsham
& Searles.

as that the time of performance were ex-
pired before his death, then it is clear the
Executors were bound to yield recom-
pence by way of damages recoverable in
an Action of Covenant, as both *Shelley*
and *Fitzherbert* agreed: and so also did
the Lord *Popham* agree in the said Case
of *Hide*, as I find in my own Report of
that Case; though in the Lord *Coke*, re-
porting only the Point in question, that
be not mentioned. Now let us consider
of the Case where there is no express Co-
venant at all, so much as for the Lessor
himself, but only a Covenant implied,
or Covenant in Law, as we call it. As if
Lessee for life make a Lease for years,
and die within the term, so as the Lessee is
evicted by him in Reversion and Remain-
der. In this Case it was resolved in the
late Queen's time by three Justices, *viz.*
Walsh. Brown and *Dyer*, that by this Co-
venant in Law the Executors were not
chargeable; and in the same Case, the
Lord *Dyer* sets down another Resolution
after to the same effect. But Master Ser-
jeant *Bendloes* reporting this latter Case
to be of a Lease made by Tenant in Tail,
viz. before the Statute of 32 H. 8. or
not warrantable by it, sets down the opi-
nion

nion contrarily, viz. that the Action was maintainable against the Executor. This may serve for instance, the like being in any other Case where the Lessor hath not a good and a firm Title, but perhaps subject to a Condition, or other Eviction, so as the Lessee cannot enjoy the Land according to his Lease.

*Tr. 22 Eliz,
rot. 459. in-
ter Brode-
ridge &
Windsor.*

But this must be so understood, that no eviction or breach of Covenant is in the life of the Testator himself; for if that be, there is no question but the Executor stands chargeable; and therefore if one make a Lease of Land by Deed wherein he hath nothing, this Covenant is perhaps presently broken; and though the Lessor die before an Action of Covenant brought, it will be maintainable against his Executor, though no express Covenant. This is useful to be known, though in these dayes there be few Leases so made, without express Covenant, and the Executors also named. And where there is a special Covenant in express words, it doth qualifie the Covenant implied: so as although words of demise and grant tie the Lessor to a general Warranty of the Title against all men, yet it being after covenanted that the Lessee shall enjoy against the

*Nokes and
Anders
Case,*

Lessor and his Heirs, or against all claiming under him or his Ancestors; now no eviction by or under any other Title giveth cause of Action, or bindeth the Lessor or his Executor to make recompence.

Of Wrongs done by Testators, and whether Executors be liable to Amends.

ALTHOUGH Executors do represent the persons of their Testators; yet if the Testator commit any Trespass upon the Goods of another, or upon his Person or Lands, no Action lieth for this against the Executor; for *Actio personalis moritur cum persona*. So if a Sheriff, Goaler

41 Aff. p. 15.
40 E. 3. Fitz.
Ex. 74. Co.
lib. 2. f. 87. a.

or Keeper of Prison, suffer one in Execution for Debt or Damages to escape; though hereby the party at whose Suit the Execution was be entit'led to an Action, viz. an Action upon the Case, against such Officer by the Common Law, and by Statute an Action of Debt; yet if he so suffering die, for that such difference was a wrong of the nature of a Trespass, no Action lieth against his Executor for the same. And upon the same reason, as I presume, if one carry away his Corn and Hay, without setting out the Tenth, although

*But see
2nd Vent
Etr. AAA.
F. N. B. 51. G.*

though the treble value be recoverable against him in an Action of Debt; yet if he die before such recovery, the Action is gone, and lieth not against his Executor; no, not although the Testator were a Lessee for years, so as his State came to his Executor.

Like Law in other penal Statutes: as, for arresting one at the Suit of *J S*, without his privity or assent; or for not appearing as a Witness, being served with a *Sub-pena*, and having charges tendered, and many like; yea, if a Lessee for years commit Waste and die, no Action lieth against the Executor for this Waste. For all these Cases are within the rule of *Actio personalis moritur cum persona*. And many other like Cases might be put, but these may suffice. Yet if a Parson, Vicar, or other Spiritual or Ecclesiastical person, do suffer a ruine or decay of the Houses or Buildings upon his such Spiritual Benefice or Promotion, and dieth; his Executors are liable, by the Spiritual or Ecclesiastical Law, to the Successor's Suit for amends, to the repairing of such spoil or decay. And because some used fraudulently to grant away their Goods, so as nothing shall be left to their Executors;

it was enacted *temp. Elizabeth*, that such
 23 *El. c. 16.* Grantees of Goods should be liable to the
 Successor's Suit for these Dilapidations, as
 if they were Executors,

As for one other Case of this nature,
212. where an Executor wasteth the goods
 of his Testator, or an Administrator the
 Goods of his Intestate, and dieth, whe-
 ther his Executor be subject to Action for
 this, or not; I adjourn the Reader to that
 place where I shall treat of such Wasting
 or Devastation by Executors.

Unto this Head not unfitly may be re-
 ferred what before is said of Actions
 against the Executors of the Debtor's
 214 *Fitz. Ex. 77.* Heir, and the Executors of the Ordinary;
 for the Specialty binding to payment
 reacheth not to any of these: but because
 their Testators should have paid these
 Debts with the Goods or Profits of the
 Lands of the Debtor, and did not, but
 retained them to themselves; therefore
 for this, as a Wrong, are they suable, as I
 take it. So also by the same reason are the
 Executors of an Administrator charge-
 able, where he did neither pay the Debts,
 nor leave the Goods to the next Admini-
 strator, but otherwise disposed of them.
 Yet an Executor is not chargeable in an
 Action

I conceive
 no differ-
 ence be-
 tween this
 and the o-
 ther Cases
supra.

Action of Detinue, nor of Account, (except to the King) for the Testator's detaining, and not paying or answering things received, or under his charge.

2 H. 4. 13.
He may by
admit. Co. l.
11. f. 88.
3 H. 6. 35.
Con. for Ar-
rerages of
an Account
before Au-
ditors.
11 H. 5. 64.
21. 92.
2 H. 6. 11.
13 Ed. 1.

And the reason why, after Account made before Auditors, and the Bailiff or Receiver be found in Arrerages and die, that in this case his Executor is chargeable, is, because the Auditors are made Judges by the Statute *Westm. 2. cap. 11.* so this Arrerage which they have judged is a Debt by Record.

But if the Case be put on the other side, viz. that the Bailiff or Receiver have found in Surplusage upon his Account, viz. that he hath laid out more in his Lord's or Master's business than his Receipts amounted unto, and then his Lord or Master dieth; now shall not he have any Action against the Executors for the Surplusage, because it is out of the purview of the said Statute.

Co. lib. 2. f.
87. 2.

C H A P. XII.

Of the Order and Method to be used by Executors in payment of Debts and Legacies, so as to escape a Devastation or charging of their own Goods.

WE have gone through and dispatched the two first proposed parts, viz. 1. Touching the being of Executors, and the manner of their being; 2. Their having, and the manner of their having. We come now to the third part, viz. Their doing or disposing of the Testator's Estate.

Now this consists principally in the issuing of Money, though partly also in delivering or assenting to the execution of Legacies, not being Money, but other Goods or Chattels bequeathed.

Money is to be issued by Executors four ways ordinarily.

About the Funeral of the Testator.

About proving his Will.

In paying of Debts.

In paying and satisfying of Legacies peculiarly.

As

As for the first, Burials be as of necessity for two respects, *viz.* 1. Of Charity to the dead, that he may be Christianly and seemingly interred; 2. to prevent and avoid annoiance to the living, who by the very view of the dead Carcasses would both be affrighted, and within a few dayes distasted at the nose. We know that under the Law the touching of a dead Carcass made a man unclean, and to need purifying: nor can we easily forget what the Sisters of *Lazarus* said to our Saviour touching their Brother, when he had been dead three or four dayes, *viz.* that the taking of him then out of his Grave must needs bring a noisome favour. Hereabout therefore some expence is necessary, and that not only for Fees to be paid, which in *London* amounts to a considerable sum, specially for such as are to be buried within the Church; but also otherwise, *viz.* for the Pall or Herse-cloath, the Ringing, &c. As for Feasting and Banquetting, it seems not to be congruent to the sadness and dolefulness of the action in hand. But howsoever that be, yet where the Testator leaves not sufficient Goods to pay his Debts, Festival expence is to be forborn,

ex-

except the Executor will out of kindness bear it with his own purse; for dead Debtors must not feast to make their living Creditors fast. I mentioned a considerable amount of funeral Fees payable in *London*: and surely (to let my thoughts fall back upon it a little) it is worth consideration, whether in that kind, and especially for those who dying there are yet carried into their Countries to be buried, the Exaction be not either unjust altogether, or too onerously excessive: so also for much Ringing, contrary to the Canon made at the Convocation in the first year of King *James*.

The next thing mentioned to justify and occasion expence is the proving of the Will. But this way a greater disbursement (except for riding charges, or by reason of opposition by a *Caveat* put in, or the like) will not stand allowable, than is prescribed by the Statute made in the time of *Hen. 8.* whereby the Fees of Ordinaries, and their Scribes, Registers and Officers be limited. And it is strange that these bounds have been so much and so frequently broken and transgressed; the rather, for that long before, in the time of *K. Edw. 3.* by an Act of Parliament it is
pro-

21 *Hen. 8.*
cap. 5.

23 *Ed. 3.*
c. 4.

provided, that the King's Justices should, as well at the King's Suit as at the partie's griev'd, enquire after such Oppressions or Extortions, for so they be called; yea, *St. Germ.* who was no stranger to the Civil and Canon Law, as appears by his Book, *Do & Sta. l. 2. cap. 10.* saith, that the Ordinary ought to take nothing for the Probate, if the Goods suffice not for Funeral and Debts; but he means only that Conscience is against it.

Now we come to the third occasion of Disbursement, *viz.* payment of Debts, which is the main part of our business. We have before seen what Debts lie upon Executors, having *Assets* to pay them; we are now to see in what order they must pay them, as well *ut sint fidei dispensatores*, as for their own indemnity, *ut quid res sua capiat detrimenti*. To put our selves into the better order or Method of handling these things, we will sort our Debts into their several kinds: Thus,

They are of these three sorts, *viz.* either

Debts of or upon Record;

Or, Debts by Specialty;

Or, Debts without Specialty.

The Debts upon Record may be again divided into four sorts or kinds, *viz.*

Debts to the King or the Crown.

Debts

Debts by Judgment or Recovery in
some Court of Record.

Debts of Recognizance.

Debts by Statute-Staple, or Statute-
Merchant.

Amongst these, the Debts of the Crown
are to have the first place of precedence ;
so as if there be not come to the Execu-
tor Goods of greater value than will suf-
fice for the satisfaction of these , he is
not to pay any Debt to a Subject ; and if
he be sued for any such, he may plead in
Bar of this Suit that his Testator died
thus much indebted to the King, shewing
how, &c. and that he hath not Goods sur-
mounting the value of that Debt. Or,
if the Subject's pursuit be not so by way
of Action, as that the Executor hath day
in Court to plead, but be by way of suing
Execution, as upon Statute-Merchant
or Staple ; then is the Executor put to his
Audita querela, wherein he must set forth
this matter. And there is great reason
why the King's Debts should thus be pre-
ferred before any Subject's, viz. for that
the Treasure Royal is not only for su-
stentation and maintaining of the King's
Houshold, but also for Publick services,
as the Wars, &c. as appears by the Sta-
tute

M. 33 & 34
Eliz. the
Lady Wal-
singham's
Case in com.
ban. & Tr.
39 Eliz.

ture 10 Rich. 2. cap. 1. And therefore it is, as I conceive, that *Bracton* saith of the Treasures or Revenues Royal, *Roborant Coronam*, they do strengthen or uphold the Crown. And for the like Reason, as I think, did God enact touching the possessions of the Crown, that if they were given to any other than the King's own Children, they should revert and come back to the Crown the next Jubilee, which was once in fifty years. *Sed de hoc satis*. But this priority of payment of the King's Debt before the Debt of any Subject, is to be understood only of Debts by or upon Record due to the King, and not of other Debts. If any ask how the King should have any Debts which shall not be of Record, since by the Statute 33 of King *Hen. 8.* chap. 30. it is enacted, that all Obligations and Specialties taken to the use of the King shall be of the same nature as a Statute-Staple; To this I answer, that there may be sums of money due to the King upon Wood-sales, or sales of Tin, or other his Minerals, for which no Specialty is given; so also for Amercements in his Courts-Baron or Courts of his Honours, which be not Courts of Record; the like of

Fines

21 E. 4. 21.
22. So must
it be plead-
ed M. 3. or
34 Eliz.

Fines for Copy-hold states there; so of the money for which Strays within the King's Manors or Liberties are sold. Also, as the Law hath lately been taken and ruled in the Exchequer, even Debts by Contract due to any Subject are by his Outlawry, or Attainder, forfeitable to the Crown. Yet neither these, nor those due to such person out-lawed or attainted by Bond, Bill, or for Arreage of Rent upon Lease, are or can be any Debt of Record, until Office thereupon found; for although the Outlawry or Attainder be upon Record, yet doth it not appear by any Record, before Office found, that any such Debt was due to the person outlawed or attainted. Thus are not these Debts to the Crown to have priority of payment before the Subject's Debts, though the King's Debts of Record are so to have. So that if a Subject to whom the Testator was indebted by Specialty sue for this Debt, the Executor must plead, that the Testator died indebted thus much to the King by Record, more than which he left not Goods to satisfy; if the truth of the Case be so: for if there be sufficient to satisfy both, then the Subject Creditor is not to stay for his Debt till the King's Debt

And must plead the Record in certain, as was held in the Case of the Lady Walsingham, *M. 33. 34. Eliz.* But it sufficeth to say, by a Record of the Exchequer, as was held *Tr. 39. Eliz. in ban. Reg.*

Debt be levied. And if the Subject Creditor sue Execution upon a Statute, so that the Exec. hath no day in Court to plead this Debt to the King, then is the Exec. put to an *Audita querela*, wherein he must set forth that matter, and so provide for his own indemnity. But what shall we say of Arrerages of Rent due to the King? Surely, where it is a Fee-farm Rent, or other Rent of Inheritance, I see not how it can come under the title of Debt, since for it no Action of Debt is maintainable so long as the State continueth in him to whom it grew due; and I find that the *L. Dyer, M. 14 Eliz.* said, that the King could but only distrain for his Rents, and not otherwise levy them of Lands or Goods; and that the King by his Prerogative may distrain in any other Lands of his Tenant, our Books tell us, but no more. Yet I know it hath been otherwise done of late in the *Exchequer*, which if it have been the ancient and frequent use of the *Exchequer* it will stand as Law, though unknown to the *L. Dyer*. Now Rent upon a Lease for years differeth from the other, since for the Arrer. thereof an Action of Debt lieth. But how can either of these be Debts of Rec. when the not payment may

be either in the Court of *Exchequer*, or to the Receiver general or particular? and how then can there be any certain Record of the not payment, so as to make any certain Debt upon Record? We know Statutes have been made to make the Lands of Receivers subject to sale, for satisfaction to the Crown; and besides that, some ancient Patents direct the payment of Fee-farms into the hands of Sheriffs. The Stat. of *Westm.* 1. cap. 19. provides remedy for the King against Sheriffs not answering the Debts of the Crown by them received: so as the King's Farmer or Debtor may have paid his Rent, or other Debt, and the Crown have not yet received it. Of Fines and Amerciaments in the King's Courts of Record, there is no doubt but they are Debts of Record.

Come we now to the Debts of Subjects, and first those of Record. Touching which I shall not be able to hold so good a Method, & so well to handle things by parts, as I would; for that the parts so stand in competition one with another for precedency, as that they must of necessity thereabout conflict and interplead one with the other, and contest one against the other: yet for the Reader's better ease and ability

ability to find out that which may concern him in his particular case, I will, in the best sort I can, single out these things into several parts, and place them in several rooms or stations. First, considering how it shall stand between one Judgment and another, had either against the Executor or Testator. Secondly, how between Judgments and Statutes or Recognizances. Thirdly, how between Recognizances and Statutes. Fourthly, how between one Recognizance and another. Fifthly, how between one Statute and another. Adding to each some Observations incident.

Now, next to the Debts of the Crown, are Judgments or Debts recovered against the Testator to have priority or precedency in payment, as being of an higher nature or more dignity than any other: for that Statutes and Recognizances, though they make Debts upon Record, yet are they begotten but by voluntary consent of parties; whereas in every Judgment there hath been a course and work of Justice against the will of the Defendant, as is presumed, and this in a Court of Justice, and the Records of such Judgments are entred in publick Rolls, not kept or

Co. l. 5. f. 281
So Wray and
Gandy, inter
Bond and
Bales, 28 El.
cel circiter.

Yea though
a Writ of
Error by the
Exec. to re-
verse the
Judgment,
yet suffering
a Stat. to be
executed,
must pay of
his own.
Read and
Beachlock's
Case, P. 43.
Eliz. Barre.
So held in
Read's Case
sup. a. Vide
12 H. 7. Kel.
24, 25. to
like purpose

Co. l. 4. f. 59.
So Periam in
comb. inter
Charnock &
Winfley,
24 Eliz. vel.
circiter.

carried in Pockets or Boxes, as Statutes;
as until Inrollment Recognizances are.
Therefore Executors must take heed that
Judgments against their Testators, (before
Debts any other way) if they have not suf-
ficient for both, be first satisfied, lest they
draw the burthen of this Debt upon their
own backs. Now their way to help them-
selves, being sued or pursued for other
Debts, is the same before delivered touch-
ing Debts upon Record to the Crown, viz.
by Plea, where they may plead, as in *Scire*
facias upon a Recognizance, or Suit upon
Band; and by *Audita querela*, where they
cannot plead, as when Execution is sued
upon a Statute. And if they had no war-
ning in the *Scire facias*, but upon *Nihil*
returned the Judgment passed, there also
the Exec. may be relieved by *Audita que-*
rela; because there was no default in him
that he did not plead, or Tet forth the
Judgment upon the Suit in the *Scire facias*.
Nor will it be any Plea for the Creditor by
Stat. to say, that his Statute was acknow-
ledged before the Judgment, and so is
more ancient; for a later or more puiſne
Judgment is to be preferred before a
Statute in time precedent. But if this
Judgment be satisfied, and is only kept
on

on foot to wrong other Creditors, or if there be any Defeasance of the Judgment yet in force; then the Judgment will not avail to keep off other Creditors from their Debts. And thus much touching Debts by Judgment, *viz.* how they stand in priority before other Debts by Statute or Recognizance. Now to see how they stand among themselves, let this be observed, *viz.* That between one Judgment and another had against the Testator precedency or priority of time is not material; but he which first sueth Execution must be preferred, and before any Execution sued it is at the election of the Exec. to pay whom he will first: yea, if each bring a *Scire facias* upon his Judgment, the Exec. may yet confess the Action of which he will first, notwithstanding the *Scire facias* was brought by the one before the other. in this *Scire facias* the Defendent may plead generally, that he hath fully Administred before the *Scire facias* brought, without shewing that he did administer in payment of Debts of as high nature; yet that must be proved upon the Evidence, else the Tryal will fall out against the Exec. Thus have I delivered the most material things, in my apprehension,

Co. l. 5. f. 28.
Co. l. 8. f. 123
So held in
15 & 16 El.
So in the
Scire Facias
by Bond a-
gainst Sales
it was held.

hension, touching Debts by Judgment; yet thereabout I will add, for the better information of the Reader not studied in the Law, these few things. First, that what hath been said, is only to be understood of Judgments against the Testator, and not of any against the Executor himself; for of those, being but Debts of Specialty at the time of the Testator's death, we shall speak after. Secondly, what is said of the Testator, in case of an Executor immediate, is likewise to be understood of the Testator's Testator, in case of the Executor of an Executor: for where *A* makes *B* Exec. and *B* makes *C* Exec. there the Goods which came from or were left by *A*, be not in the hands of *C* liable to Judgments had against *B*; nor, on the other side, are the Goods of *B* in the hands of *C* subject to the Judgments had against *A*. And the like is to be understood of Statutes, Recognizances and Bonds, as elsewhere is somewhat touched. Thirdly, Recoveries or Judgments by mere confession, without defence, are yet of the same nature, and to have the same respect, as other Recoveries upon Trial or otherwise: for though they may seem to be but of the nature of Recognizances, which be *debita*

recog-

9 E. 4. 14, 15.

Quere, of

Arrerages of

Account be

fore Audi-

tors without

Suit; for the

Executors

are charged

by Judgment

of the Audi-

tors by Stat.

W. 2. Judg-

ment of Re-

cord.

10 H. 6. 24,

25. Bre. det.

183.

recognita; yet do they differ from them, in that here a Debt is demanded by a Declaration which is intended true, and that therefore the Defendant cannot deny it; but in case of a Recognizance it is not so, for there usually no Action is entred, nor Debt demanded. Fourthly, the foreshe-wed respect to debts by Judgment is not to be inclosed within *Westminster Hall*, and be restrained to the four Courts there, but may and must extend it self to Judgments in other Courts of Record, *viz.* in Cities and Towns Corporate, having power by Charter or Prescription to hold Plea of Debt above forty shillings, as in *London, Oxford, &c.* For although there Execution cannot be had of any other Goods than such as be within the Jurisdiction of that Court; yet if the Record be removed into the *Chancery* by *Certiorari*, and thence by *Mittimus* into one of the *Benches*, so Execution may be had upon any Goods in any County of *England*. Fifthly, in Case where the Testator was bound in a Recognizance, and a *Scire facias* brought against him, and thereupon Judgment given; although this Judgment be not, *quod recuperet*, as in case of Actions of Debt, but, *quod habeat executionem*;

Quere of Judgment in a Writ of Annuity for Arrearages after.

nem; yet since Execution is the life, fruit and effect of all Judgments, this may now well stand for a Debt by Judgment, as I take it.

Of Recognizances and Statutes.

NExt unto Debts by Judgment are those by Stat. or Recognizance to be regarded by the Executor. And because I find no difference of priority or precedency between these two, I therefore rank them together: yet one reason of preferment given to Judgments before Statutes in *Harrison's Case*, viz. that the one remains a Record upon a Roll in the King's Court, whereas the other being carried in the pocket of the Conusee is more private; this, I say, should give priority also to Recognizances before Statutes: As also another reason, for that Statutes are not properly Records, but Obligations recorded; yet do I not find that this makes a difference for priority of payment. And indeed the Stat. is the more expedite remedy, since thereupon Execution may be taken out without a *Scire facias* or other Suit, which cannot be in the case of a Recognizance: for there, if a year be past after the Acknowledgment, no Execution can be sued out against the party

Party himself acknowledging it, without a *Scire fac.* first sued out against him; and if he be dead, then though the year be not past, yet must a *Scire facias* be sued, and thereupon the Executor Defendent may plead some Plea to hold off the Execution for a time. But, this notwithstanding, the Executor may satisfie the Recognizance before the Statute, at least if he do it before Execution sued thereupon; for they standing in equal degree, it is at his election to give precedency and preferment to whether he will. Neither is it material which of them were first or more ancient; nor between one Statute and another doth the time or antiquity give any advantage as touching the Goods, though as touching the Lands of the Conusor it doth; but as for his Goods in the hands of his Executor, whosoever first getteth hold of them by his Execution, shall have the preferment. And before suing of Execution, the Executor may give precedence or preferment to whom he will. But now some may object, that there is no course nor Writ of Execution for any such Conussee against the Executor; and if so, then Statutes merchant and of the Staple are in vain spoken of, and it is true that Master
Brook,

Before *Sci.*
fac. not after,
 voluntarily,
 but if levied
 by Writ of
 Extend. is
 good.

Bro. No.c.
294. & Stat.
Mer. 43.

Co. l. 5. f. 28.
h. H. 30
El. rot. 119.

P. 32 El. rot.
235. in co. b.

Brook, after Chief Justice of the *Common Pleas*, in his New Case, professeth, that he knew not any remedy for the Creditor out of the Goods of the Conusor after his death. But if this should be so, the Law were very defective, since the substance of many, especially of Merchants, for and among whom the Statute-Merchant was provided, consisteth usually more in Goods than Lands: besides, the Plea of *Harrison*, Administrator of the Goods of *Sidney*, in Bar of *Green's* Action of Debt upon an Obligation, viz. that the Intestate stood bound in a Statute-staple to *J. S.*, and *Green's* Reply thereunto, that there were Indentures of Defeasance, no Covenant whereof was broken, and the Resolution of the Judges, that the said matter in the Replication was good to avoid the Defendant's Plea; all this, I say, (and the Resolution of the Judges of the *Common Pleas* in that Case, and in the Case between *Pemberton* and *Barram*, as also in the *King's Bench* by *Popham* and the rest of the Judges, that Executors must satisfy Judgments before Statutes, and Statutes before Obligations) had been idle, and favouring of gross ignorance, if no Execution at all

all could be had against the Executor of him bound in a Statute ; and then should *Green* have demurred upon the Plea of *Harrifon*, and needed not to have pleaded that other matter : but none of the Judges or Serjeants ever conceited any such matter. That which there was replied, viz. that the Statute was not forfeited, is here to be remembred as good matter both against Statutes and Recognizances ; and that whether the Recognizance have a Deafeance, or a Condition not broken, so that the Recognizance is not forfeited. In none of these Cases is the Executor hindered from payment of Debts by Specialty, nor can he be justified or excused if by colour thereof he refuse so to do : and indeed else might Creditors be exceedingly defrauded by Recognizances for the peace and of good behaviour, &c. and so by Statutes for performing Covenants touching the enjoying of Lands, if these should keep off the payment of Debts ; and yet themselves perhaps never be forfeited, nor the sums become payable.

See Co. lib. 5.
91. Executi-
on against an
Exec. upon
a Statute.
Semaine's
Case.

Co. lib. 5. f.
28 So if sa-
tisfied,
though not
discharged.

Of Debts by Specialty.

NOW come we to Debts due by Specialty, *viz.* Bond or Bill, (of which nature the greatest number of Debts are.) Let us then see what course the Executor must or may hold for satisfaction of these, admitting that the Testator stood not indebted to any Record, or that no forfeiture is of any such Debt, or that there be Goods in the Executor's hands above the Amount of such Debts by Record. This, I say, *dato*, then according to the Rule, *Proximus quisque sibi*, the Executor may first satisfy himself of such Debts as the Testator by Specialty owed him: for such Debts are not released by the Creditor's taking upon him to be Executor to the Debtor; though, on the other side, if the Creditor make his Debtor Executor, this is a Release of the Debt. Although it be given out or commonly spoken in the general, that an Executor may first pay himself; yet is it to be understood with this caution or condition, *viz.* That the Debt to him be of equal height or dignity with the Debts to others, according to the Rule, *In equali jure, melior est conditio*.

in possidentis : for if his Testator were indebted to other men by any Statute, Judgment or Recognizance, and to him whom he maketh Executor only by Bond or other Specialty ; then may he not first pay himself, that is, by paying of himself leave them unpaid whose Debts are of an higher nature ; but if there be sufficient for satisfaction both to them and himself, then is it not material which he first payed. Now touching the Debts to other men, the Executor hath power to give preferment in payment to whom he will: so that if the Testator left but 100*l.* being indebted to *A* 100*l.* and to *B*. 100*l.* by several Obligations ; the Executor hath power to pay *B* his whole Debt, and to leave *A* altogether unpaid any part of his Debt, so as he have not commenced any Suit before payment to *B*. But yet herein this difference is to be taken and observed by Executors, that if the time of payment upon the Bond of *B* were not come at the time of the Testator's death, then may not the Executors, before the money to *B* become payable, pay him, and leave *A* unpaid, whose money was presently due. Yet if *A* forbear to demand or sue for his Debt till the Debt of *B* become also payable ; then

is

28 H. 8. Dy.
22. Doct. &
St. ca. 10. p.
78.

is it at the will of the Executor to pay whether of them he will ; so as the other may lose his whole Debt, if the Goods will not suffice to pay both ? What if *A* have only by word demanded his Debt, and not by Suit, before the Debt to *B* become payable ? whether doth that hinder that the Executor may not now, when the money to *B* is also payable, pay him, and leave *A* unpaid ? And hereunto *S. Germ.* answereth negatively, making this verbal demand to be idle, and of no value : yet he addeth, that if *A* have commenced Suit before the Debt to *B* become payable, yet if the Executor can delay the Suit till the Debt of *B* become payable, so that *A* can get no Judgment before that time, and before *B* hath commenced Suit upon his Bond, then may the Executor confess his Action, and so pay his Debt, leaving *A* unpaid. But of this I make some doubt, for that I find in 9. of King *Edw.* 4. some Admittance, that if *A* having a Tally, Patent, or other Warrant from the King, for receipt of money of or from a Customer or Receiver, where other had like Warrants before him, but *A* maketh the first Demand ; now must the Officer first pay him;

Do. & St.

p. 78.

Quere, if then he may not plead this Judgment *post. ult. contin.* against *A*, as he may plead it against other Suits after commenced.

Co. lib. Intr.

148, 269,

149. a.

him, or else himself shall become Debtor to him, if he first pay others whose Demands were after made, though they had Warrants before *A.* Likewise there is, as to me seems, some Admittance in the same Book, that the very Demand made by a Creditor of his Debt from an Executor, who hath then *Assets* in his hands, doth entitle the Creditor to recover damages against the Executor out of his own Goods: which if it be so, then doth even the verbal Demand lay some tie or obligation upon the Executor for payment. But hereabout I lay down nothing peremptorily. We partly may discern by the Premises how the Executor is to guide himself, in the case where there be divers Debts by Specialty all due and payable at the Testator's death, before any Suit commenced for any of them: for in that case clearly the first verbal Demand gives not any precedence, all being due, and so standing in equal degree. And this is implied in many Books, making the commencement of the Suit only that which entitles to priority of payment, or at least restrains the election of the Executor. Yet, admit that one Creditor first doth begin Suit, if others

41 E.3. Fitz.
Ex. 68. 6 & 7
El. Dy. 232.
Vide 21 H.7.
Kelw. 74.

3 Hen. 7. 27.
So Walmfley
Just. P. 39
Eliz. in Er-
ror s. Ser-
jeants Inn.
Co. lib. Intr.
286. such a
Recovery by
Confession is
pleaded a-
gainst ano-
ther, and
admitted
good, & f.
148, 149.
Do. & St. P.
78. b.

others also after sue before he be paid:
or have Judgment; now cannot the Exe-
cutor pay him first who first commenced
Suit, but he who first hath Judgment
must first be satisfied. And the Execu-
tor may herein yield help to one before
the other, viz. by Essoigns, Emparlan-
ces or dilatory Pleas to the one, and by
quick Confession to the other's Action:
for he is not bound against his will to
stand out in Suit, and expend Costs, where
the Debt is clear: nor is this Covin, but
lawful Discretion, which Conscience will
also approve, some good consideration
inducing. Nay, after Suit commenced,
yet until the Executor have notice there-
of, he may pay any other Creditor, and
then plead that he hath fully administred
before notice. Nor is the Sheriff's re-
turn of Summons or Distress sufficient
cause of notice; for the Summons might
perhaps be upon his Land: but if it were
to his person, it is notice sufficient; and
then, to save himself he must say, that
he was not summoned till such a day be-
fore which he had fully administred. Yet
doubtless the Executor may be arrested
at the Creditor's Suit in some sort, which
yet shall be no sufficient notice of this
Debt:

Debt. As for the purpose, if he be sued by *Latitat* out of the *King's Bench*, this, supposing a *Trespas*, gives no notice of a Debt, so also of a *Sub-pena* out of the *Exchequer*; but the Original returnable in the *Common Pleas* expresseth the Debt, and so in some sort doth the Process thereupon. And there it seems by some Books, that if it be laid in the same County where the Executor dwells, he must take notice of it at his own peril. But this I take not to be Law, nor is there any great opinion that way: and although, to make it more clear, the Executor in *King Hen.* the fourth his time, estranging himself from notice of the Suit before payment to others, did alledge, that the Action was laid in a forein County; that is no great proof, that if his abode had been in the County where the Action was brought he must have taken notice; but thus it was clearer, and a little surplusage hurts not.

So also was
it said Tr.
29 Eliz.

Now between a Debt by Obligation and a Debt for Rent or Damages upon a Covenant broken, I conceive no difference, nor any priority or precedency; but it is at the Executor's discretion to pay first which he will, as if all were by Bond. So also

of Rents behind and unpaid, as I conceive; but touching them, principally intending Rents upon Leases for years, divers considerations are to be had, and some Distinctions to be made. As first, between Rent behind at the time of the Testator's death, of which that before said is to be understood, and that which groweth behind after; next between Suit for the Rent by Action of Debt, and Distress and Avowry. As to the first difference, if the Rent grew due since the Testator's death, then is it not accounted in Law the Testator's Debt; for only so much is in Law accounted *Assets* to the Executor, as the profits of the Lease amounted to over and above the Rent; so as for that Rent so behind the Executor himself stands Debtor, as hath been resolved, and therefore he is suable in the *Debet* and *Detinet*: whereas for Rent behind in the Testator's life, and all other the Debts of the Testator, he must be sued in the *Detinet* only. Hence it must follow, as it seems, that an Executor sued for Debt upon Bond or Bill cannot (except in some special Cases) plead a payment or recovery of Rent grown due since his Testator's death: though of Rent behind at the time of his death it be otherwise. And yet

yet here again another difference or distinction is to be taken, viz. where the Profits of the Lease exceed the Rent, and where the Rent is greater than the yearly value of the Profits; for even there, as elsewhere is shewed, the Executor, if he have *Assets*, is tied to the holding of the Lease, and payment of the Rent, and consequently, doth so much of that Rent as exceeds the yearly Profit stand in equal degree the Testator's Debt, with other Debts by Specialty. And yet again to re-consider this Point, what if the Debts of the Testator by Specialty payable presently at his death, or before the time that any Rent can grow due upon this Lease, shall amount to the full value of the Testator's goods; may not then the Executor, though he do not pay those Debts before the Rent-day, (for that would make the Case clear) wave the Term? for if he may, then haply if he do not so, but shall by payment of any of this Rent want Goods to pay any part of the Debts by Specialty, it may lie upon himself and his own Goods, as happening by his own default. But on the other side it may be said, that he could not wave it so long as he had *Assets*, because thereby he stood equally liable to pay that Debt, be-

ing once due, as the other Debts by Specialty. On the other side it may be said, that though the Debts for Rent and upon Bond shall be admitted to be in nature equal; yet the Case being put of Rent not due at the time of the Testator's death, it was not then a debt nor Duty, whereas a Bond makes a present Debt and Duty, though not presently payable, the day of payment being not yet come; so as this latter is discharged by a Release of Debts or duties, and so is not the former. So to leave that Point unresolved, let us next see whether in some case, though the Rent exceed not the yearly value of the Land, yet even that payable after the death of the Testator may not stand in most part, if not wholly, upon the Testator's score, as his Debt, as well as if it had been payable before his death. *Posito* then that the whole or half year's Rent is payable at the *Annunciation* of our Lady, and that the Testator dieth two or three dayes or some like short time before that Feast; now certainly should the Law be unreasonable, if it should lay this debt upon the Executor's shoulders, in respect of those few Winter-days profits which he took. But surely, since the taking of the Profits induceth the

the Law to lay the Rent upon the Executor as his own Debt; therefore, as where the Executor had the profits for the whole year or half year, except some few days incurred in the Testator's life-time, those few days will be unregarded, according to the Rule, *De minimis non curat Lex*, and the whole Rent shall lie upon the Executor as his own Debt; so on the contrary part, when the whole year or half year's Profit, except some few days, incurred after the Testator's death, the Rent, becoming payable so instantly after the Testator's death, must in reason lie wholly up on the Testator's Estate, as to me it seems. What if to this I add, that the Testator's Cattel wherewith the ground was stocked do depasture and devour the Profits all the time after the Testator's death, till the day of payment of the Rents? Nay, if the Rent were payable at *Mich.* and the *Annunc.* and the Testator dies a few days after *Mich.* the Rent being of or near the value of the Land, it will then be hard that the Exec. shall for this Winter-profit pay the Rent out of his own purse, especially if the whole year's Rent be payable at that one day, as in some Cases it is; or if the whole year's Profits were taken in

the Summer, as in case of a Lease of Tithes. It is so also of Meadow-grounds, usually drowned in the Winter. So if the Lease be then to end, not having a Summer half-year to succeed and make amends for the Winter: or if the Winter half-year be the latter half, the Lease beginning at *Lady-day*, so that there is but a Summer for each Winter following, and not any for the Winter passed. Of like consideration with these is the case of a Lease of Woods for a Rent, which being sellable but once in eight or nine years, now if, the Lessee having made the last Sale and Felling before his death, the Law should cast the Rent upon the Executor's own Estate for the time future, it should lay loss upon him, which is against Reason, and contrary to the nature and disposition in the Law, even in this particular: as appears by this, that she enables an Executor to pay himself before any Debt of equal nature, so as she more renders an Executor's indemnity than any other Creditor's. Therefore I think that, with and upon the differences above shewed, even Rent grown due after the Testator's death may in some cases be the Testator's debt, payable equally with debts by Bond,

Bond. But here I conceive, that if the Executor were in such case of destitution of *Affairs* as might justify his waving of a Lease over-rented, he then may wave the term's residue; because for the future the Profits will come short of answering the Rent, though at the first, and so in the total, the Profits did exceed the Rent. And if for want of waving where he might this Rent fall upon him, the payment thereof would be no excuse against another Creditor, nor as to him be a good Administration; for *Ignorantia Juris non excusat*. This is pertinent to our present consideration, which Debt may with safety be paid, leaving another unpaid: and the hazard of Executors by ignorance of the Law hath been a principal motive to my writing these Discourses in *English*. Hitherto we have only considered, as I think, of Rents as they be recoverable by Action of Debt. Now let us see if there may not be somewhat different considerations touching distraining for Rent, and so coming to recover it by Avowry. Put we then the case that an Executor hath fully administered in payment of Debts by Bond, and after the Lessor or Reversioner cometh and distraineth for Arrearages of

Rent due in the Testator's life, can the Executor in bar of the Avowry plead Fully Administred, as he might have done if an Action of debt had been brought for these Arrerages? Doubtless, I think no, nothing shall hinder the levying of the Rent upon the Land, so long as it is enjoyed under the title of the Lease, except the Land come to the King, upon whose possession no Distress can be taken. I think therefore that the Executor, who pay'd out of his own purse to the value of this Lease, (for so I intend the Case, and else could he not have fully Administred, as in the Case was put) should have abated in the price and valuation of the Lease as well the Arrerages of Rent, as the Rent futurely payable, both being equally leviable upon the Land; and if he so have done, he is no loser by payment of this Arrerage: but if, trusting to the power of an Executor & to the Plea of Fully Administred, he did not so, but disbursed, in respect of the Lease, to the full value without such Abatement, he must bear the loss of his own ignorance. He might also another way have helped himself, viz. by payment of that Arrerage, leaving other Debts by Specialty unpay'd. And what if Suits were pre-

presently commenced upon the Testator's death, before he could make payment of the Rent behind? whether might the Executor then plead this Debt for Rent, as he might a Debt by Judgment or Statute? Surely methinks it's probable that he might, because it is a Debt from which he cannot be freed by payment of the other Debts sued for by Specialty. If the Reversioner would also commence Suit before Judgment had for the Creditor by Specialty, then might the Executor help himself by confessing his Action first: but this perhaps the Reversioner would not conceive safe for him, since that way the others might get Judgment before him, and so he might lose both his Suit and his Debt; whereas holding himself to the course of Distress, the Lease continuing, he hath Land at the stake for his Debt. What if he distrain and avow? may not now the Executor pay him, or at least confess his Action or Avowry, so as he first having Judgment may first be satisfied? Surely after Suit commenced I see not how the Creditors by Bond can so be prevented, at least without Judgment had for the Rent, yea though such a Judgment he had; yet because the Judgment in that case is not, that he shall recover the

the sum due for Rent, but only that he shall have a return to the Pound of the Cattel distrained for the Rent, it is questionable whether the payment thereupon of the Rent shall prevent the Judgments after had in the Suits upon Bonds. But I think it shall; because although it be not an expresse Recovery of the Rent, yet it is such a Judgment compulsory for the same as makes the payment inevitable and of necessity. And where before we have made the question only between the said Rent-debt, and the Debt by Obligation; let us now put the Case between the Rent-debt, and the Debt by Statute or Judgment. If then the Lessor, after death of the Lessee, distrain for the Rent behind part of the Testator's Cattel, and after there come a Writ of Execution upon a Judgment or Statute of the Testator's; whether shall these Beasts in the Pound for Rent be delivered in Execution or not, admitting that without them there be not Goods sufficient for satisfaction of the Judgment or Statute? And surely I think they cannot be delivered in Execution. First, for that they are in the custody of the Law, as in *Stringfellow's Case*, though there the King's Prerogative

See 1; R. 2.
Bro. Pledges
31. Attainder of the
party di-
strain'd shall
not take away the Dis-
stress, 12 Dy.

rogative overtopped that point. Yea so I think, though they be replevied, for that they are to be returned to the Pound, if Judgment pass for the Avowant, to which purpose Security is given; so as they are but in the case of a Prisoner bailed, who still is in some sort in custody. Secondly, for that this Rent incident to and descendible with the Reversion breeds a Debt of a real nature, and so of more dignity and worth than Debts personal. Thirdly, for that the Land let (as in a sort Debtor) stands chargeable with this Distress from the very time of making the Lease, as either by Contract real of *quid pro quo*, or rather by an operation of Law or Legal Constitution, or ancient Custome of the Realm, without any Contract of persons. Lastly, for that the Lessor doth not distrain the Cattel therefore, or in that respect, for that they are or were the Goods of the Testator, but for that he found them levant and couchant upon the Land which must afford his Rent, or a Distress for it if behind: so as if they had been any Under-tenant's or Stranger's Cattel, they might have been distrained. Some may perhaps object
this

this reason why these impounded Cattell should be delivered in Execution, viz. for that where otherwise the Creditor by Statute or Judgment should lose all or part of his Debt, yet by this Relief done to him shall not the Lessor lose his Rent, for that he may at any time after distrain any Goods or Cattell found upon the ground at any time during the continuance of the Lease. But here, besides the point of delay and stay for this Rent, which to many is the sole means of maintaining their Households and Families, this farther is considerable, that perhaps the Lease may be near expiring, perhaps so highly racked and rented even to or above the value, as that the Executor having his Testator's stock taken from it and him by Execution, will not stock it any more, and so the Land lying fresh, if the Lessor shall lose the benefit of his former distress, he shall be perhaps without remedy for his Arrerages of Rent. And if the case were of a Distress for Rent behind after the Testator's death, I conceive, though not so strongly, for most of the reasons above said, that the Law would be all one as in the other Case : for though in this Case respect shall not be had to the Executor's loss

loss upon whose Goods the Law casts this Debt, though not the other; yet here the point of loss must fall either upon the Lessor losing his Distress, or upon the other Creditor by Specialty or Record losing wholly or in part his Debt. And in respect of this local tie upon this Land for payment of the Rent, whereto, even the Fealty of the Lessee and Tenure of the Land bindeth him, I think no act that the Lessee can do by entering into Bonds or Statutes, or having Judgment against him, can hinder the Lessor or Reversioner from taking his remedy upon this leased Land for the Rent therefore due; but rather any other Creditor shall be a loser in his Debt. Doubtless, if in bar to the Avowry for this Rent due either before or since the Testator's death the Executor will plead, that the Testator was indebted 1000 l. by Statute, Recognizance, or Judgment, which is more than all his Goods amounted unto; it will be no good Plea, but may be demurred upon. What if he plead so much Debt of Record to the Crown? Surely I doubt whether this Plea will be allowed in any other Court than in the *Exchequer*: yet if these Arreages of Rent shall be levied upon the

*Vide Bro.
Pledg. 31.*

the Land, so as either the Executor must pay it, or lose the Cattel distrained by a Return irrepleviable, and then shall not have sufficient to satisfy the Debt to the Crown; I see not how he shall well escape, when pursued in the *Exchequer* to make up this Crown-debt out of his own purse, which is hard. For this we may pitch upon as a Maxim and Principle, that an Executor, where no default is in him, shall not be bound to pay more for his Testator than his Goods amount unto. Again, it is a rule, that where nothing is to be had, *viz.* justly to be had, the King loseth his right: and our Books tell us, the King's Prerogative must not do wrong. *Potestas est juris est, non injuria: nam potestas injuria non est Dei, sed Diaboli.* On the other side, it may be said, that if Land leased come to the King by Grant, Outlawry, or otherwise, the Rent reserved cannot be distrained for; and therefore it is not very unreasonable nor incongruent that the King's interest for his Debt should make the Distress of a Subject stand by and give place. This therefore among other of the Premises do I leave as a *Quære*: nor is it altogether unfit

So Bracon.

fitable either for an Executor or Creditor to know what wayes and passages, what cases and contingents be doubtfull and hazardous. And if in these unbeaten paths, where our Books and Relations have held me forth no light expresse or particular, I have erred in mis-resolving, or missing to resolve; I hope I shall without difficulty obtain pardon.

Now let us consider of Assumptions or Promises made by the Testator upon good consideration; the performance whereof, or making recompence and satisfaction for not performing, doth lie upon an Executor, as before is shewed. These therefore are to come behind, and give place unto all the former; so as an Executor this way or for these sued may plead Debts by Specialty, Rent, &c. amounting to the whole Goods. And yet these Debts by Contract or Assumption expresse are to be satisfied before Legacies be to be had. First, because by the Common Law of the Land those are recoverable, and so are not Legacies. Next, because, as our Books speak, it concerns the Soul of the Testator to have *as alienum*, all Duties and Debts to other men, satisfied before the Debtor's voluntary Gifts or Bequests,

Co. lib. 9. fo.
88. b. Doct.
& Stu. lib.
2 cap. 10
II.

quests. Also these Debts by Assumption or simple Contract are to be satisfied before the reasonable part of the Wife or Children, to which by Custome in some Counties they are intituled. See 21 *Ed. 4.* 21. and 2 *Ed. 4.* 13. and 2 *Hen. 6.* 16. And note that in such an Action upon the Case, it is not of necessity to lay or set forth in the Declaration that the Defendent hath *Assets* to pay all Debts by Specialty, and this also; but if there want, the Defendent must alledge that in his excuse, for else it shall be presumed that he hath *Assets*. So, also in an Action upon a Case grounded upon the Executor's own Assumption to pay his Testator's Debt; and yet, as the *L. Coke* conceives, and upon good reason, as to me it seems, if the Executor so promising had not *Assets* sufficient in his hands to pay this Debt promised, he pleading *Non assumpsit*, may give that in evidence; for then the consideration faileth; as also if there were no such Debt due, since the Plaintiff could not have recovered if he had sued, and so his forbearance to sue was no valuable consideration.

Co. l. 9. fo.
90. b. Pin-
chen's Case;
and fo. 94.
Dane's Case.

C H A P. XIII.

Of Devastation or Wasting.

THAT which St. *Paul* of Dispensers Spiritual (who are as it were the Executors of the last Will and Testament of our Saviour *Christ*) doth say or enjoyn, *viz.* that they must *be found faithful*; the same is required of these less or inferiour Dispensers, the Executors of mens Wills: and hereof they are to be regardful, not only in respect of escaping damage to their own Estates, but more especially in respect of an Oath which divers of our Books mention to be taken by Executors. And in one of the Books of relations of Cases in the twentieth year of *H. 7.* his time, there is an expression of three things whereto the office of an Executor tieth him. 1. To do truly, and thereto are they sworn, saith this Book. 2. To be diligent, *viz.* with sedulity to attend the discharge of the trust. 3. To do lawfully; nor well can this latter be without knowledge what is lawful

Q

or

or required by the Law. Now what is formerly said of the right Method and order of payment of Debts, discovereth in much part how and by what ways an Executor may waste and mis-spend his Testator's Goods, and consequently incur a Devastation, and so make his own Goods liable. But of that more fully and particularly by it self. And herein we will consider of these parts.

1. What shall be said to be a Wasting or Devasting, and how many ways that may be done.

2. Who shall by this Act be charged to yield recompence.

3. Who shall take the Benefit or advantage of it.

4. How far or in what measure the vantage shall be taken.

5. What way or by what means it shall be had.

As to the first. this Wasting is done divers ways. 1. By the Executor his plain, palpable and direct giving, selling, spending or consuming the Testator's Goods after his own will, leaving Debts unpay'd. 2. By paying what is not to be pay'd; which yet is to be understood where there are Debts payable, and unpay'd.

pay'd. 3. By the way formerly discourf-
ed of, viz. the not observing the right
method and order of payment. 4. By af-
senting to a Legatee's having a thing be-
queathed, Debts being unpay'd. 5. By sel-
ling Goods of the Testator's at an under-
value; for (be the Appraisement what it
will, and let him sell for what he will) he
must stand charged to the best and utmost
value towards the Creditors. Yet if upon
a Judgment against the Testator or the
Executor the Sheriff sell some of the Te-
stator's Goods at an under-value, this is
no Vastation of the Executor, for this diffe-
rence *Hody* chief Baron makes. But since
an Executor may haply prevent this act of
the Sheriff, by paying the due sum upon
sale of the Testator's Goods at the best va-
lue or otherwise, he is to be blamed to
leave it to the Conscience of the Sheriff or
Under-Sheriff rather. 6. And lastly, this
may be done to the Executor's smart by
undue, viz. not legal, discharging of any
Debt or Duty pertaining to the Testator,
and that divers ways requiring heedful-
ness. As if an Executor upon a Bond of
two hundred pounds forfeited for pay-
ment of 100 l. accept the Principal, or
perhaps also some Use, Costs, or Damage,

13 E. 3.
Fitz. 91.

Yet on the
other side, if
an Executor
by payment
of a 100 l.
yet in a for-
feited Bond
of 200 l. it
shall be an
Administ.
but of 110 l.
27 H. 8. 6. P.
Fitz. *inst.*

and give a Release or Acquittal of the whole forfeited Bond, or of all Actions, or upon Record acknowledge Satisfaction upon Judgment had; this is a Wasting of so much as the penal sum is more than is received, and so far his own Goods stand liable to Creditors not satisfied: and so doubtless is it, if he do but give up the Bond, having no Judgment upon it, though he neither make Release, nor acknowledge Satisfaction. But his verbal Agreement to require or sue for no more, or his giving a Note of receipt for so much as he hath received, or delivering of the Bond into a friend's hands or into a Court of Equity in way of Security to the Debtor, that he shall not be sued for more, is no Devastation, since still the rest in Law remains due and suable. So this sets no more upon the Executor's score than he received. But let him take heed of Releasing, except he be sure there be no other Debts demandable. Nor only is there danger in Releasing of Debts, but of Trespasses or other causes of Action also. As if one take away Goods from the Testator, or from his Executor; if the Executor make him a Release, this is a Devastation, and makes his own Goods liable to the

the whole value of the Goods released ; as appears by *Russell's Case*, where the Release of an Infant Executor to one who had taken and committed to his use Jewels & Goods of the Testator, being pleaded, the Release was therefore held void in respect of Nonage ; for that if it should have stood good, it had amounted to a *Devastavit*, and made the Executor's own Goods liable ; which, his Infancy considered, had been hard. Another way of discharging dangerous to Executors is, submitting matters of Debt or Duty, or touching Goods taken away, to Arbitrement. For if by the award of the Arbitrators the Debtors or Wrong-doers be discharged or acquitted without making full recompence, the rest of the value will (as to other Creditors) sit upon the Executor's skirts, because it was their voluntary act thus to submit it to Arbitrators. Thus may Executors fall under prejudice, not only by wilful Wasting or unfaithful miscarriage, (wherein they are not to be pitied) but through incogitancy & unskillfulness also. Nay, I may say truly, that it is very hard for Executors in some cases to walk safely: for besides that, to find out all Judgments and Recognizances by or against their

their Testators is of some difficulty more than for Statutes, whereof by search in an Office descry may be had; yet with this difference, that Statutes-Merchant and Statutes-Staple may be and stand effectual against Executors, though not inrolled; albeit against Purchasers of the Conusors Land they be not of force, if neglect be of Inrollment within three months. But where Statutes or Recognizances lie for performance of Covenants upon Sale or Lease of Lands, Marriage, Agreements, or otherwise; how hard is it for Executors to know whether any Covenant be broken or not? how hard to be sure they find out all Bonds, Bills, Covenants and Articles in writing, made and kept by others, whereby any money is due and payable before Debts by Contract or Legacies, as also all Promises or Debts by Contract payable before Legacies? For the Law hath prescribed no time for their claim and demand; & whether some such thing or mean of publication were not fit to be enacted, let the judicious consider. To attain to this knowledge of the Testator's Debts, I remember that it is by the Lord *Brook* reported, that in King *Hen.* the 8. his time, Sir *Edmund Knightly* being Executor

cutor to Sir *William Spencer*, made Proclamation in certain Market-Towns, that the Creditors should come by a certain day, and claim and prove their Debts; but he for this was committed to the *Fleet*, and fined. For that none may make Proclamation, saith the Book, without Warrant or Authority from the King, except Mayors and such like Governours of Towns, who by Privilege or Custom may so do. But the dangers are only where there is not sufficient of the Testator's Goods and Chattels to satisfy both Debts and Legacies. For where there is so, the Executor is not in any such hazard as aforesaid. This descry of Danger may breed Caution; and *Qui timent cavent, & vitant*.

As to the second, we shall have in consideration two sorts of persons, *videlicet*, 1. his Executors, there being many times divers Executors, and the Waste or Devastation done but by one; 2. the Executor's own Heirs, Executors and Administrators, *viz.* whether, he dying, this act shall fix upon them like charge and burthen for satisfaction, as upon himself should have lien in case he had lived.

Touching his Companions though all
 Q 4 together

Lib. Intrat.
fol. 327.
Kelw. rep.
fol. 23.
80 11 H. 6.
38. a
4 El. Dy. 2.
10. a. the
Writ so is-
sued against
the Waster
only.
P. 4 H. 8.
vol. 303.
Tr. 34 Eliz.
Pas. 36 Eliz.

together make but one Executor, yet the
mis-doing of one shall not charge the rest,
nor make their Goods liable to recom-
pence: as both appears by the Book of
Entries, and was also held in the time of
Henry the seventh, Ann. 12. of his Reign.
Yea of the same opinion were the Judges
twice in the late Queens time, viz. first
in a Case between *Walter* and *Sutton*, in
the *Common Pleas*, and shortly after in
the *King's Bench*, in a Case between
Hankeford and *Metford*; though these
two Cases be not reported in Print. And
surely this stands with rules of Reason or
Justice, that each should bear his own
burthen: If it were otherwise, many
would decline and abandon Executor-
ships, as very dangerous to the most ho-
nest and faithful, in case they were subject
to racking by the miscarriage of their
Collegues.

As for the Executors or Administrators
of the wasting Executor dying before he
have born the burthen of his mis-doing,
I have found contrary opinions, even in
the late Queens time. For first, in the
Exchequer it was conceived to be as a
Trespas dying with the person, as coming
within the Rule, *Actio personalis moritur*

cum

cum persona. But in the said case of *Walter and Sutton* the Court of *Common Pleas* Mich. 31 & 32 Eliz. Tr. 34 Eliz. was of contrary opinion, viz. that this was not escaped by the death of this Misdoer, but the Law would pursue his Executors or Administrators, & lay upon their backs the burthen of Recompence or Satisfaction; for that the Testator or Intestate doing this wrong had made himself to be Debtor in the first Testator's stead, and therefore they who represent his person must with his Goods make amends and supply. And this later opinion was something in time after the former. Also between these two times was there an opinion in the said Court of *Commons Pleas* agreeing in part with this later: For there a Judgment being had against an Executor, and the Sheriff upon the *Fieri facias* Mich. 32 & 33 Eliz. returning that there were no Goods of the Testator in the Executor's hands, and then this Executor dying, a *Scire facias* upon a suggestion of Devastation by the said Executor deceased was awarded against his Executor, and that upon good debate, and shew of a Precedent left, and reported by M. *Jennour* in King Hen. 8. his time. And it was then said to have been clear, that if a Devastation

on

on had been returned in the life-time of the said wastful Executor, his Executor then should have been charged. All the doubt was, for that here that was not done in his life-time; yet at last affirmatively (as above is shewed) the Resolution was.

Touching the third Point, *viz.* To whom the advantage of Wasting shall accrue, or who by reason thereof shall charge this wasting Executor: Put we the case the Testator stood indebted to *A* by Statute, and to *B*, *C* and *D* by Specialty not of Record, as Bond, Bill, &c. and the Executor having no more in *Assets* than only an hundred pound, and this all being due to *D*, he payeth him the whole hundred pound, not having any thing left to satisfy any of the rest of the Creditors: hereby wrong is done to none but *A*, who was a Creditor by Statute, and therefore he only shall make this Executor to pay the like sum out of his own Goods, since as to him only this is a Devastation, or that it was at his election to pay off the other Creditors, which he would, no Suit being commenced by any of them, consequently no wrong was done to *B* nor *C*. And if no such

such Debt had been by Statute, but all had been Creditors by Specialty, and *A* only had commenced Suit, and that known to the Executor; now if after he payed all to *D*, he stands only as to *A* liable in his own Goods, and not to *B* nor *C*. But if the Executor had only paid a Legacy or Debt by Contract, leaving nothing for satisfaction of the Debts by Specialty, then had he stood equally liable to each of the other Creditors. *Capiat qui capere potest*, viz. He who first could recover, or by the voluntary act of the Executor could obtain payment, must be preferred, if the sum would reach no farther. For it shall by this mispayment, or misconversion, stand with the Executor as if he had not payed it nor departed from it at all upon the matter: and therefore I doubt not but it is free for him to give the advantage of this his error to which Creditor by Specialty he will, so as he shall stand free from all the rest, no surpluse remaining, nor any Creditor of Record being. For if there be any Debt upon Record, the Executor sued by a Creditor upon Bond may, notwithstanding this his Wasting, plead in bar of this Suit, that there is such a Record of a Debt not satisfied,

If upon fully administered pleaded to one, *vel aliter*, he have the advantage of this Wasting, taking up the whole Sum wasted, *Que*. how the Executor shall relieve himself against another.

satisfied, and that he hath no more than that Debt amounts unto, and so admit so much still in his hands as he hath mis-administred, though in kind it be not in his hand, but mis-spent, or unduly payed, as aforesaid. And what is before shewed of the Statutes precedency before Bonds, in taking the advantage against an Executor for devasting or wasting, the same is to be understood of precedency of Judgments before Statutes, and of Debts to the King before Judgments, &c.

As touching the fourth Point, viz. How far the Executor thus wasting shall incur damage or make his own Goods liable; Doubtless, no farther than the value of the Testator's Goods wasted or mis-administred. Therefore if one have advantage thereof to the full summ, no other after shall; for he is no farther a Trespasser or Wrong-doer, nor is the Testator's Estate any farther or deeplier damnified. And as Damages for Trespass are to be proportioned to the value of the Wrong done and loss sustained; so also in this case the Executor by his mis-doing doth not draw upon himself his Testator's whole Debts, but so much only as the Goods amounted to which he did mis-

mis-administer, and which should have gone to the payment of the Testator's Debt, if he had not so misguided himself in the office of Executorship; which default he must repair or make good. And this proportion seems to me proved by the Case in *K. Edw. 3.* where the value or quantity is found, especially of the Goods administred wrongfully, though thereby a wrongful person: and in *Sutton's Case* it was expressly held, that each Executor should answer for so much as he wasted.

41 E. 3. 31.

Now for the fifth and last Point, *viz.* How and in what manner Relief shall be had upon this point of Wasting, for him to whom it pertains: First, this is to be observed, That in case where the Verdict passeth directly against the Plaintiff, no Devastation can come in question, for that no Judgment being for the Plaintiff, no Writ of Execution can issue; & therefore, if upon the issue of Fully administred it shall appear that there hath been a Devastation, which causeth *Assets* to fail, then must the Jury find that the Defendant hath *Assets*, and not find a Devastation, as was resolved in the *King's Bench* in the late Queens time between *Hankeford* and *Mesford*: for there the Jury find-

Pl. 36. E.
in 6. reg.

ing

ing a Devastation, viz. a Surrender of a Lease for years left by the Testator, it was held void and nugatory, and was not regarded by the Court, which said that must come in by the Sheriff's Return, viz. upon the *Fieri facias*. Thus *Assets* being found in the Executor's hands, Judgment is given for the Plaintiff to recover his Debt, and to have it levied of these *Assets*: nor is this finding of them by a Jury against truth, though they be wasted, and so not to be had in kind; for the Executor hath them in right, since he hath not rightfully parted from them; according to the Rule, *Pro possessore habetur qui dolo (or injuriâ) desinit possidere*. As in the Case first put, this Wasting cannot come in question for want of a Judgment for the Plaintiff; so also where the Judgment it self extendeth to the Executor's own Goods by reason of some false Plea, whereof we shall after consider: for since that the consequence and effect of a Vastation is but to make the Executor's own proper Goods liable to the Debt of the Creditor, this is altogether needless where the Judgment it self hath laid hold on his Goods. But now in case where the Judgment extends only to the Testator's Goods

Goods in the Executor's hands, let us find the way to relieve the Creditor, in case the Testator's Goods be wasted by mis-administring or otherwise; for hereabout the right way hath often been missed, and again easily may be. In the latter end of the late Qu. time, this course was taken, viz. The Sheriff returning generally, that the Executor had no Goods, a Surmise was entered, that the Executor had converted to his own use the Testator's Goods, whereupon a Writ was awarded to the Sheriff to enquire thereof by Jury or Enquest, which he did, and returned, that it was found that the Executor had wasted the Goods; and thereupon a *Scire facias* was awarded against the Executor, to shew cause why Execution should not be of his own Goods; and upon two *Nibils* returned, Execution was so awarded: but a Writ of Error was hereupon brought. And although it were said, for defence of that course, that it was usual in the *Common Pleas*, and more favourable than the other course, where the Sheriff only returneth the Wasting, or is sole Judge thereof, whereas here it was found by an Inquest of Jurors, and thereupon a *Scire facias* awarded; yet did the Court resolve

45 El. Pet.
Sheriff's Case.
Co. lib. 5.
fol. 32.

So 9 H. 6. f.
9.

See *Paston*,
11 H. 3. 16.
30, upon
furnise that
A hath wa-
sted, a *Fieri*
facias may
issue against
his Goods
only, if so,
&c.
So *lib. Int.*
fol. 11.

resolve the contrary, and reverse this Execution as erroneous: for it was said, that upon the Sheriff's return of *Nulla bona*, viz. that there were no Goods of the Testator to be found, the Plaintiff should have a special Writ of *Fieri facias*, willing the Sheriff to levy the sum recovered either of the Goods of the Testator, or if it could appear that the Executor had wasted the Testator's, then to levy it of his own Goods. And this way, as was said, the Executor hath good remedy by Action against the Sheriff, if without just cause he levy it of his Goods; but the other way, viz. when Inquest is thereupon taken, the remedy fails, since neither the Sheriff doing according to the Inquest can be punished, nor the Jurors finding falsely are subject to any Attaint, it being no Verdict upon Issue joyned, but an Inquest of Office, which excludeth also all challenge of Jurors. And whereas that Book mentions the Sheriff's subjection to Action only in case of his misfeasance or doing wrong; I conceive that he is likewise suable for omission or non-feasance in this case, viz. for not levying the Debt upon the Executor's own Goods, where proof is made of

of his Wasting. And where the Book mentions this *Fieri facias* to be in this manner upon the Sheriff's return in a *Sci-re facias*, doubtless the Book therein is mis-printed, and should be a *Fieri facias*; for in a *Sci. fac.* the Sheriff can return nothing but that he hath warned the party, or that he hath nothing whereby he may be warned. This then is the course there prescribed, that first a general *Fieri fac.* go out, and that thereupon the Sheriff return generally, that the Defendent hath no Goods of the Testator's, and that thereupon the said special Writ is to issue. Yet in the beginning of the late Queen's time, the Verdict passing for the Plaintiff upon the Issue of Fully administered, the Sheriff was not permitted to make such a general Return of no Goods to be found of the Testator's, but was enforced by the Court upon good advisement either to levy the Debt, or to return a *Devastavit*: and so it was done at last by the Sheriffs of London, much against their minds; and thereupon went out a Writ to levy the Debt of the Executor's own Goods, first in London, and after in Devonshire, upon a *Testatum* that the Executor had Goods there. And it was there said, that

a E.I.D. 485.
Woodw.
and Chiche-
ster's Case.

if no Goods could be there found, then the Plaintiff might have a *Capias* to take the Executor's Body in Execution, or an *Elegit* for the Moyety of his Lands. But certainly I cannot find (except with a difference) how this course of enforcing the Sheriff to do one of these two can be just; as neither could Justice *Falsborp* in the time of K. Henry the sixth approve it. For a Jury of one County may find *Assets* in another County, as was resolved in the time of K. Henry the 8th, which yet was understood of Goods moveable, and not of Lands. This then thus being, if a Jury of *Kent* find *Assets* which be in *London* or *Essex*, how can the Sheriff of *Kent*, where the Action was laid, levy the Debt recovered by or out of these Goods? or, since he cannot, why should he be compelled to make a false Return of a Wasting, when the Goods remain unspent and unwaisted in another County? Why rather should he not be suffered to return according to truth, that there is nothing within his County or Bayliwick whereof the Debt may be levied, since even his Oath tieth him to make a true Return? Nor is this contrary to the Verdict, finding *Assets* generally; and

11 H. 6 f. 28.
28 H. 8. Dy. 3
Yea Co. lib. 6.
f. 47. 48. Assets in Ireland, or elsewhere beyond the Sea, may be found by the Jury where the Action is laid.

For the Pl. may, if he will suggest the being of *Assets* in a foreign County, and this is usually done. See lib. inr. II. 2. Action upon the Case for a false Return of Devastat. contra fact. sui debitum, 28 H. 8.

and this so returned upon a *Testatum*, the Process may be directed into the right County. But in the said Case it was replied to the Plea of Fully administred, that there were *Assets* in *Essex*, the Action being laid in *Middlesex*, and yet, as it seems by the Book, the Trial was to be by a Jury of *Middlesex*, which, saith the Book, may find the *Assets* in *Essex*: but there the Plea was demurred upon, and held a good Plea; which proves, that although the transitoriness of the *Assets* makes them subject to the notice of a Foreign Jury, yet is it not like an act transitory, and not local, for that must be pleaded to be done in the place where the Action is laid, though in truth not so. But had Issue been joyned upon the point, methinks it should be tried in *Essex*, where the *Assets* be laid; the rather for that perhaps they may be real Chattels, viz. Lands leased to the Testator, or other Lands of him appointed to be sold for payment of Debts, which, as heretofore hath been held, a Jury of another County cannot find. Besides, although such a Foreign Jury may find other movable *Assets*, yet is it at their election, they are not thereto compellable, as elsewhere is holden. Here then

2 Ma. Bro.
Almain 104.
5 10 El.
Dyer : 71.
Because lo-
cal & fixed,
otherwise
held, 3 Jac.
in com. ba.
Co. lib. 6. f.
46, 47.
22 E. 4. 9.
2 Ma.
Bro. Att.
104. 18 H. 7.
Kelw. rep.
31. a. So held
P. 31. E.
in Scaccar.

may be the difference, viz. That if the *Assets* be found to be in the County where the *Testator* is, there the Sheriff of that County cannot return *Nulla bona*, without adding that the Executor had wasted: but if there be no Verdict at all touching *Assets*, Judgment passing against the Executor upon a Demurrer, Confession, *Nihil dicit*, or the like; there may the Sheriff make such a Return of *Nulla bona Testatoris*, without returning any Devastation: and so also where the Verdict either findeth *Assets* generally, not finding in what place they be; or expressly findeth them to be in another County, as a little before we found may be done by a Jury of London of *Assets* in *Essex*.

So if the Process for Execution go into another County than where the Verdict found as the difference was held in *Scac. 31 El. 28 H.8. Dy. 30. b. Pas. 4 H.8. rot. 303. 4 El. Dyer 210.*

But 3 H.6. 13 without any *Sci. fac.* upon the Devast, returned, a *Capias* was awarded by the Court; and see 9 H. 57. Bro. Ex. 57. & Lib. 24. r. 320. A *Fieri fac.* absolutely and without condition.

In King Henry the Eighth his time, as a little after the said *Chichester* is by the Lord Dyer reported, the Sheriff returning upon the *Fieri facias*, that the Executors had no Goods of the Testator's, did add in the same return, that one of the two Executors had wasted, and thereupon a *Sci. fac.* was awarded against him; & upon *Sci. feci* returned, and Default made, Execution was adjudged, and awarded against his Goods only. And this course of *Sci. fac.* both the *L. Dy.* (as elsewhere I find it reported)

posted *Temp. H. 6.* approved. But
 I am perplexed with doubt what Plea the
 Executor coming in upon the *Scire faci-*
as could plead; for except his denial of
 Wasting might be pleaded contrary to the
 Sheriff's Return, and put in Issue so as
 to cause a new Trial after a former, per-
 haps preceding, Judgment, which I think
 would not be admitted, then his coming
 in is to little purpose, for ought I can
 conceive. Here again it must be observ-
 ed, that in the Case of *Chichester*, the
 Judgment was had upon Trial of Fault
 administred: but in the other Case in the
 time of King *Henry* the Eighth it was up-
 on Confession; which is all one, as I take
 it, with Condemnation upon Demurrer,
 or *Non sum informatus*, or Trial upon *Non*
est factum, to the Bond, or a Release to the
 Testator or the like. Now between all
 these and that of *Chichester* there is a
 broad difference: for there the Defendent
 being convinced by Verdict to have *Assets*,
 which if they continue not in his hands in
 kind, must be answered out of his own
 Goods as wasted, therefore the *Fieri fac.*
 to levy the Debt of the Testator's Good's
 if any found, or in default thereof out of
 his own Goods, is very agreeable & pursu-
 ant;

So *9 H. 6.*
49, 50. A
 manuscript
 report.
36 H. 6.
 and *Man-*
dant, 2 H. 7.
Kelw. rep. 24
But Fawcett
just. and all
 the other
jurists &
cont. 2 El.
D. 115.

Co. l. 5. f. 31.

Mic. 41 E. 112.

rot. 2. 4.

Co. lib. intr.

266. b. A re-

covery of

Debt prece-

dent was

pleaded: Pl.

replied *Nul-**tiel Recogd.*

and Defend.

would not

maintain his

Plea. *Ideo**condemp.* If

neither, he

must so re-

turn, and do

nothing.

ant; but in none of the other Cases is there any such Trial or conviction of the Defendant's having *Assets*, so as it rests *æque dubium* whether they have *Assets* or not: and therefore it may seem somewhat hard and harsh to send out such a Writ in that Case; and so should I have thought, if I had only seen the Report of *Pettifer's Case*. But looking into the Record, and finding the Condemnation there to be by *Nihil dicit* in effect, I cannot uphold any distinction of course in respect of the said difference of Cases. Nor indeed doth that course there directed presume that the Executor either hath *Assets*, or hath wasted them; but commands that if *Assets*, &c. then the levying shall be one way; if Wasting, then another way: so if neither, *Nihil fiend.*

CHAP. XIV.

Of an Executor of his own wrong.

TO begin with some definition or description of this man; He is such as takes upon him the Office of an Executor by intrusion, not being so constituted by the Testator or deceased, nor for want

want of such Copstitution substituted by the Ordinary to administer. Touching whom we will consider in these parts, and with this method, viz.

1. What acts or intermeddlings of such an one, not being Executor nor Administrator by right, shall make him to become an Executor by wrong. *Vide* five more, per Stat. 43 El. cap. 8.

2. In what manner and by what name such shall be sued, especially when another than he is Executor or Administrator, or himself after such act becomes Administrator.

3. How far he becomes liable to Creditors, and how, and to whom.

4. What acts done by him shall stand firm as if he had been an Executor by right.

5. See a late Stat. 43 El. cap. 8. hereabout. 1 Point.

As to the first, it was in the time of Queen Mary doubted, and not resolved, whether the only seising and taking into one's hands the Goods of the deceased did make one Executor of his own wrong, without any farther act. And in the beginning of the late Queen's time the L. Dyer said, that the possession and occupation of or meddling with the Goods is that which gives notice to Creditors

1 & 2 P. & M. Dy. 103. b

1 El. Dyer 166 & 167. So also Bel. 47. 50 Ed. 3. 9.

ditors whom they are to sue as Executor. But doubtless Creditors must look farther before Suit; for else can they not know whether he so intermeddling be Executor or Administrator; nor consequently how to found their Suit rightly and safely for good success; since a Suit against an Executor as Administrator, or against an Administrator as Executor, will prove ruinous, and fall to the ground. Yea where an Administrator sued as Executor did not plead that Administration was committed unto him, but generally denied that he was Executor, or administered as Executor; the Lord Dyer held that it must be found for him, yet left it doubtful; but the clear and safe way had been to have pleaded the Administration, &c. And in the former Case the Lord Dyer said, that one intermeddling only about the Funeral, and laying out money therefore, an Overseer or Conductor, or he who hath Letters of the Ordinary *ad colligend. viz.* to get and keep the Goods in safety, and one who intermeddleth by virtue of a Will truly made, but controlled by a latter Will after found and proved, may free himself from being an Executor of his own wrong, by special plead-

23 & 14 El.
Dy. 305, 306

1 El. D. 166
& 167. See
4. Mir. 322. b.

pleading how or in what right he intermeddled, and traversing his Administring in other manner: and that this Traverse need not, nay may not be, was held in the time of King Henry 6. and 7. for that such acts amount not to any Administring at all; and where no Administring at all is confessed, such a Traverse of not Administring in other manner is dissonant, and not legal. But let us look back upon these several points exempted by the Lord Dyer, and we shall see some cautions necessary touching them and their safe entertainment. First, as touching the point of Burying the dead, it must be understood to be with some expence of the deceased's Goods, and so it is expressed in the said Book of *Hen.* the 6. his time: else for a man out of Charity to lay out of his own money (not intermeddling with the Goods of the deceased) to bury a friend, hath little colour to involve him so doing in an Executorship by wrong. Taking the Case then, that such person lays out or expends of the deceased's Goods or money upon his Funeral, heed must be taken touching the measure and proportion whereabout. Though I can give no particular and distinct limit, yet doubtless

12 H.6.38.
10 H.7.38.
Yet *Lib. in*
tra. 321. b.
where he
confessed a-
bout Func-
ral, he tra-
versed *aliter*.
Lib. in tra.
321. where
by Letter *ad*
collig. he
traversed,
Alsq; bec
quod &
Ex. c.

31 H.6.27,

less either mere necessity, viz. Church-duties, &c. or at least decent Sutable-ness to his quality must be the bounds. And herein to speak as I think, this latter must either be utterly excluded, or held within very narrow compass: for what reason that a Knight or man of higher quality, leaving (though perhaps entailed Lands of good value) yet Goods not sufficient to pay his Debts, should have an hundred pounds or more of that which should satisfy Creditors spent in pompous interring of him for his Worship and reputation? Next, Overseers may only be excused for seeking to preserve and keep the Testator's Goods, not in case they expend or dispose thereof. So also for him who is authorized by the Ordinary to collect, for if he sell or dispose of any (though Goods otherwise subject to perishing) it makes him an Executor by wrong, as was resolved in the late Queen's time, notwithstanding that by the Ordinary's Letters, he was expressly directed or warranted so to do; for it was said, the Ordinary himself could not so do. As for him who administered by virtue of a Will after disapproved, or controlled by a Letter, he must

*Lip. int. 322.
8 & 9 Eli.
Dyer 255,
256. He sold
blended
Corn, but
there he
pleaded not
the special
matter.*

must not doubtless stand free for the Goods before administred, but either as rightful or wrongful Executor stand liable to the Creditors. Nor doth every such intermeddling by one out of all these excuses and evasions as would be an Administration, make one an Executor by wrong. If one do but take an Horse of the deceased, and tie him in his House or Stable, this makes him not an Executor, saith *Passon* a Justice, 'or like acts or intermeddlings; as he that delivers to the Wife of the deceased her Apparel, at least if it be no more than is convenient to her degree. But if she take, or another deliver, more than such to her, she, or he becomes an Executor by wrong. But now let us come to a difference, where there is a rightful Executor, and a Will by him proved, or Administration committed; for there such light acts or intermeddlings shall not make one an Executor by wrong, as where there is no other of right to be sued. As if one take goods wrongfully from such a right Executor or Administrator, this (though he convert them to his own use) makes him not an Executor by wrong, but a Trespasser to the right-

10. 2 P. &
Ma. Dy. 185.

21 H. 6. 12.

33 H. 6. 32.
1 Eliz. Dy.
166.

Tr. 37 Eliz.
by Fenner.

Just. If one
do any such
act as pulls
the Property
out of the
Executor,
he is become
an Executor
by wrong.

If the Goods be aliened by fraud, he who takes them after the Executors death is an Executor by wrong.

Tr. 37 Eliz.
D. 5 E. 4.
72. a.

rightful Executor or Administrator, who even for these Goods, once *Assets* in his hands, stands liable to Suits of Creditors, they being neither lawfully evicted nor rightly administred: but in case there had been no Executor at that time, or no Will proved, nor Administration committed, then such taking of the deceased's Goods into a strange hand had made an Executorship by wrong. And thus was the difference lately resolved, as is reported by the *L. Coke* in the Case between *Read* and *Carter* in the *Common Pleas*.

Tr. 2. Jac.
Dom. b.
Co. lib. 5.
53 & 54.

1 Eliz. D.
160. b.

7 H. 5. 20.

Yet this farther difference was there held, *viz.* That although there be an Executor or Administrator by right, yet if a Stranger take upon him to receive Debts and make Acquittances, or to pay Debts, claiming to be an Executor, he is suable as an Executor by this Act: and so also in the late Q. time was held by 6 Just, as touching the receipt of Debts and making Acquittances; but the Book mentions not whether any other Executor then were, or not. But in the point of bare payment of Debts *Frowick* makes another difference, *viz.* If a Stranger do with his own money pay the Debts of a Friend deceased, and not with the Debtor's; this is but

but an act of Charity, and makes him not an Executor by wrong: otherwise, if with the Debtor's money. Yet to this another difference must be added, *viz.* That if he thus paying with his own money, have taken into his own hands Goods of the deceased; then is his payment presumed as by or out of the value of these Goods, and so makes him an Executor by wrong. Contrarily, if he have no such Goods in his hands. And in the point of intermeddling with and disposing of the Testator's Goods, where another Executor is, this farther difference is to be added or understood, *viz.* That where the Goods so taken never came actually to the Executor's hands, but were in a remote place, there this taker becomes Executor. For as it were mischievous to the Executor, if he should by a possession in Law cast upon him stand chargeable with these Goods in remote places purloyned, as *Assets* in his hands; so were it as mischievous to Creditors, if neither Executor by right, nor this Strangar as an Executor by wrong, should stand liable to Creditors for them. It is true, that the right Executor may sue and recover Damages for them, and that so recovered shall be *Assets*;

Affers; but the Creditor hath no mean at the Common Law to enforce him to sue, and perhaps it may be a cold Suit. And with these Additions I think that late resolved difference may stand firm and found. Yet in former times, without such difference, the taking only and possession of the Goods of the deceased was held to create an Executorship by wrong, as *Belknap* said in the time of King *Edw.* the third; and especially if the Act were such as removed the Property of the right Executor, as Justice *Fenner* in the late Queen's time said, *teste meipso*.

50 E. 3.
fol. 9.

Tr. 3 Eli.

How and by what name Suit shall be against such, and the like.

2 Point.

L. 5 E. 4. 71.
Co. lib. 5. 30.
31, & 32. b.
21 H. 6. 8.

Touching the second Point, viz. In what manner Suit shall be against such: First, in general, this usurping Executor is not in Suit to be distinguished by name from the right Executor, but to be sued generally by the name of Executor of the last Will and Testament of the Defunct; and then if he will deny himself so to be, he must plead that he neither is Executor, nor hath administered as Executor. Then the Plaintiff must

must prove that he hath administred in
some such or the like sort as aforesaid.
And it hath been divers times held, that
where there is a right Executor, and yet
another doth administer by wrong, it is
at the election of Creditors either to sue
them joyntly together, or one or both of
them severally and by himself. But if
where Administration is committed, a-
nother also administers by wrong, these
cannot be sued together as Administra-
tors; for though one may be an Execu-
tor by usurpation or wrong, yet none can
come to be an Administrator by wrong,
since no other but such as receiveth that
power from the Ordinary can so be:
therefore in that case there is a necessity
of suing him apart and by himself (who
so usurpeth Administration) by the name
of an Executor.

So if *A* administer the Goods of *B*, not
being Executor nor Administrator, and
after his such doing and disposing of the
Goods, he obtaineth Administration of
the Goods of *B*, but the Goods left or
coming to his hands since the Administra-
tion committed suffice not without the o-
ther Debts received or released, or Goods
sold before, to satisfie Creditors: now

if

Co. lib. intr.
154. But
145. a. in the
Verdict he
is called Ex-
ec. de inju-
ria sua pro-
pria. 39 H. 6.
45, 46. 21 H.
8. 8, 19. 9 E.
4. 14, 15. 1 E.
2 P. & M.
Dyer 165.
33 H. 6. 38.

35 H. 6. 32.

23.20.

21 H.6.8.
If the Ad-
ministration
were com-
mitted be-
fore the Suit
began, the
Writ shall
abate, else
not, as was
of old con-
ceived.

if any sue *A* by the name of Administrator, he shall have no farther Relief than according to the value or extent of the Goods left in or come into his hands since the Administration committed; and if those be fully administred, he shall get nothing; if they remain unadministred, but amount not fully to his Debt, he must want so much of satisfaction; and if he will be relieved, or satisfied out of the Goods before disposed of, he must sue *A* as Executor of *B*. And so was it ruled and resolved by *Gawdy* and *Suit*, Justices in the *King's Bench*, in the late Queen's time, viz. Tr. 30 *Eliz.* And if this now Administrator will plead in Abatement of this Action that Administration was committed to him, and demand Judgment, if *Suit* shall be against him as Executor, then the Plaintiff must in the Replication, as I take it, set forth the special matter, viz. how the Defendant did administer before Administration to him committed. But if one to whom Administration is committed do debase, and this Administration is by *Suit* repealed, because he was not the next of kin, and Administration is committed to another, now a Creditor who would be relieved out of the
the

the Goods wasted, must see that first as Administrator, and not as Executor of his own wrong, said *Popham* Chief Justice, for he did rightfully administer for that time. *Vid. 8. 189.*

AS for the third, *viz.* How far this Executor of his own wrong becomes liable and obnoxious to Suit, consider we these things. *3. Point. How far liable to Creditors.*

First, he becomes subject both to the Action of the Executor, who hath right to the goods wrongfully intermeddled with all by him, though it were before proving of the Will; and also to the Action of the Creditor, who hath right to the Satisfaction of his Debt,

Secondly, as touching the measure how far he is engaged, doubtless he is not by his wrongful Administring become chargeable with the whole account of the Testator's Debts; but only so far, and with so much thereof, as the Goods which he so wrongfully administered amount unto. (Yet he must look to his Plea, else by it he may draw all sued for upon himself, as if he deny his being Executor or Administrator.) And this seems to me proved by the Case in the time of Edward the third, where the Inquest found

*Co. lib. intr.
144, 145.
Plus de hoc.*

S

not

not only the Administring or Intermeddling by the Executor wrongfully, but found also, by direction of the Court, (as it seemeth) what the value was of the Goods so wrongfully administred, which had not been material, if the Administring of a peny had made one as far chargeable as the Administring of a pound. Besides, if it be so that a rightfull Executor wasting Goods of the Testator to the value of 20 l. shall be no farther charged than that value, then doubtless so shall it be also in this case, for both be wrongfull Administrations: only this difference there is between them, that in one case the Administration is by a wrong person, and in the other case in a wrong manner. Nay, the Lord Dyer doth not stick to call him who administreth wrongfully, or in undue manner, expressly an Executor by wrong, in the Case of *Stooks* against *Porter*, though he were rightfully Executor, because he did dispose or execute wrongfully.

1 El. Dy.
167. cap. 12.

4. Point.
What acts
of his of
force.

AS to the fourth, viz. What acts done to him or by him who is an Executor of his own wrong shall stand firm and good, as done by or to the right Executor :

tutor : Suppose, first, that the deceased were indebted to him 20 l. who thus usurpeth Executorship, whether may he pay himself or not? And this point was in debate in the *King's Bench* between *Coulter* and one *Ireland*, Executor of *Hunt*, where it was strongly objected, that notwithstanding the rightfull Executor or Administrator might punish him, and recover against him, for the Goods which he administreth; yet another Creditor suing him as Executor generally, and so affirming him to be, (for there is no special form of Writ or Declaration to distinguish an Executor by wrong from a rightfull Executor) he stands as against him in the state of a rightfull Executor, and therefore may first pay himself before he pay others : and of that mind at the first were *Fomer* and *Gaudy* Justices; yet did they admit that this payment should not stand good as against the rightfull Executor or Administrator. And *Popham* and *Clinche* held strongly, that neither should it stand good against other Creditors; for then every man would rush upon the Testator's goods, and be his own Carver in payment. And whereas it was said at the Bar, that the Lord *Anderson*, upon an Evidence at

*M. 40. 41 E.
Co. lib. 5. f.
30.*

Guild-hall had ruled it otherwise, *Popham* at another day of debate of the said Case related, that the Lord *Anderson* did deny that he ever so ruled, or was of that opinion; and farther informed, that both he and Justice *Walmsley*, *Periam* and *Clark*, Barons, did agree with *Popham* and *Clinch* in opinion. After which, Justice *Gawdy*, as also *Fenner*, if I mistake not, changing their opinions, and concurring with the rest, Judgment was given accordingly. In the debate of this Case question was made, If such an Executor by wrong pay a Debt to another Creditor by Specialty, whether this shall not stand firm and good, since he stands liable to Creditors so far as the Goods by him administred do amount. And it was agreed, by the better opinion at least, that this should stand firm and good; so as if the payment were out of his own goods, he might retain to himself in lieu thereof so much of the Goods of the Testator: for here he doth not, as in the other Case, advantage himself by his own wrong. Yet that opinion, allowing this payment to Creditors, must, as I think, be understood with this difference, *viz.* that this payment shall stand as against other Creditors, but not as against the right

right Executor or Administrator: for then any stranger might usurp the Office of Executor, and take from him that liberty and election, to prefer which Creditor he will in first payment; yea, might take from the Executor power to pay himself before other, in case there were a Debt due to him, which were very unreasonable.

Of Addition and Alteration by the Statute
43 Eliz. cap. 8.

WE having considered what the Com- 5. *Point.*
mon Law is and willeth in the
Premises: let us now see what Alterati-
on or Addition a late Statute hath made.
In the last Parliament of the late Queen
Elizabeth, consideration being had of sub-
tile getting into mens hands Goods of an
Intestate by Deed of Gift, or Letter of At-
turney, from one of small or no ability, to
whom such subtile Contriver hath procu-
red Administration to be committed, and
so himself would stand free from the Suit
of Creditors, the Administrator himself
either not being to be found, or not be-
ing of any value to satisfie Creditors; it
was therefore enacted, that every person
receiving or having any Goods or Debts

of any Intestate, or any Release or Discharge of any Debt or Duty belonging to him upon any Fraud, as aforesaid, or without consideration of or near the value, (except in satisfaction of some just and principal Debt, to the value of the Goods or Debts due from the Intestate) shall be charged as Executor of his own wrong, so far as the value of those Goods and Debts amount, deducting all principal just Debts to him due, and Payments by him made, which a lawful Executor ought to have paid. Here have we a touch of all the parts precedent, or at least three of them.

1. We have first a new Executor by wrong, though intermeddling under the title of an Administrator,

2. We have a limit of the Charge by him incurred, sutable to our former expression.

3. Lastly, we have to him an allowance of Debts owing to himself, or duly paid to others; which is more than we have conceived allowable to another Executor by wrong.

C H A P. XV.

*Of Pleas by Executors, and which be best,
which most prejudicial to them.*

SINCE amidst the Pleas pleaded by Executors there is such difference, as that some induce one kind of Judgment, some another, some drawing more loss and burthen upon Executors than others: let us consider of the differences, so as light may be taken to chuse the safest or fittest for each case.

If an Executor do utterly estrange himself from the Executorship, saying, that he was never Executor, nor ever administered as Exec. (for that must be added) then if the Issue be taken upon the Plea, & it be found against him, the Plaintiffs shall have Judgment to recover, not Damages only, but even the Debt it self, out of the proper Goods of the Executor, if none of the Testator's can be found to satisfy it. And this shall be thus not only where it is found that the Defendant was made Executor by the Will, and proved it, and so could not chuse but know it; but even also

Plea denying the Executorship,
21 H. 6. 19.
20. Bro. 62.
3 E. 4. f. 4.
19 H. 7. 15.
Libr. inr.
332, 333.
33 H. 6. 33.
34.

where he had never proved the Will whereof he was made Executor, nor ever Administred by virtue thereof; yea, though he did before the Ordinary refuse to be Executor of this Will, or to intermeddle with the Execution thereof; yet if any other named Exec. with him did prove the Will, or did not refuse to be Executor, let such other Refuser take heed of pleading that Plea. For truth is against the first part of his Plea, viz. that he never was Executor; and so the Verdict, which must be *Veritatis dictum*, must needs pass against him, and make his own Goods liable as well to Debts as Damages. What if no other were made Executor, but this only who refused before the Ordinary? may he safely plead that he never was Executor? I think not, since he so was Executor before his refusal, that he might have released all Debts due to the Testator, and given away all his Goods; therefore I think he must plead specially, shewing his Refusal, and not generally deny his being Executor. Nay, admit he never was once named, made, or intended to be made Executor, yet having pleaded this Plea, that he never was Executor nor administred as Executor, if it shall be found by Verdict that he

He was suitable as soon as the Testator was dead.

he did administer or intermeddle as Executor, the same blow or burthen falleth upon him : for then the latter part of this Plea is found untrue, yea the whole upon the matter, for by this Administring he became an Executor of his own wrong, and the denial of this Executorship by wrong or usurpation shall be as penal to him as the denial of a rightful Executorship. The like Law, where the Executor pleads a Release made to himself, or a payment of the debt, or other performance of the Condition made by himself, Nay, I find in this latter Case the Judgment entred generally against the Defendant, as against another for his own Debt, not being Executor. And the reason why the Law makes these so penal to an Executor is, because his Plea is not only false, but the falshood thereof was willful, since it must of necessity be known to himself to be so. And lastly, for that all these Pleas, if they had proved true, had been perpetual Bars, at least against the Defendant : the first indeed had not been a Bar against another, being in truth Executor or Administrator. But if the Executor had pleaded a Release made to his Testator, finding such a one among his writings,

But if he did it as Administrator, it is otherwise ; yet see that specially pleaded Co. lib. Intr. 148. a.

See Co. lib. Intrat. Judgment so entred. 145. b. Read and Carter's Case.

Co. lib. Intr. 29. a. not first de bonis Testatoris si, &c. See Bro. Ex. 22. these reasons : for this diff.

33 H. 6. 23, 24.

which

So of other
perform. Co.
Lib. intr.
193: and
6 E. 4. 1. 7
E. 4. 8. See
Bro. Ex. 22.
That the
Book con-
trarily re-
ported 34
H. 6. 22, 23.
is errone-
ous, as was
descried by
Fitz. & al.
23 H. 8.
the Record
being not so
as the Book
saith the
Judgment
was.

which yet was either forged, or never both sealed and delivered by the Plaintiff as his Deed; or if he plead payment made by his Testator; neither of these Pleas found against him shall cause the Judgment to fasten upon his own Goods: so if he denied the Bond or Bill, whereupon the Suit is grounded, to be the Testator's Deed. For in all these Cases the truth being not known to him, he might honestly and reasonably conceive it to be as he did plead. But what if he plead Fully Administred, and this be found against him, which rested in his own knowledge? shall not this false Plea expose his own Goods, in defect of his Testator's, to the satisfaction of this Debt? No, it shall not, for that though this were a false Plea, and that within his own knowledge, yet was it not a perpetual Bar; for if it had been so found as was pleaded, yet *Assets* coming after to the hand of the Executor, the Plaintiff should then have Relief and Satisfaction out of these since accrued *Assets*. If any ask how *Assets* may after come, I will give him two or three instances. First, it may be by recovery of Debts before withholden or of Damages for Goods taken away,

or

or by voluntary payment of a Debt not before due, for that the time of payment was not come. Secondly, if the Testator, having a Lease for twenty years, did demise the same to J S for the whole term, if he so long should live; if he were alive in time of the former Verdict, but now is dead, the term continuing; this is now *Assets*, which before was not, whilst it was but a possibility of a term. Other instances might be given, but these may suffice. If the Executor pleaded that the Testator stood bound in such a Statute, or that there was such a Judgment against him of Debt to the King, beyond the satisfaction whereof the Goods would not reach; this is in effect a Fully administered, though special, and not general; and the Law is alike (as I take it) in all these cases, as to the not making of the Executor's Goods liable. But in all these cases, though the Debt shall not be adjudged upon the Executor's own Goods, yet the Damages shall, in default of the Executor's Goods to satisfy them. And in these cases it is not material whether the Judgment passed upon Trial or Demurrer. Nay, if the Defendant Executor plead no Plea, but confess the Action generally,

Lib. int.
148, 149.
This good,
though the
Judg. were
by non sum
inform. and
an averment
that it was
without Co-
vin.
Co. Lib. int.
152.
11 H. 4. 6.
There a *Cap.*
ad sat. was
awarded for
the Dama-
ges.

or

But he may, I think, for-
bear so to
do, and to
the Judg-
ment for
partial,
that when
more *Assets*
come, he
shall have
more. *Lib.*
Inrat. fol.
223.

Fol. 542.

or be condemned by *Non sum informatus*; the judgment is the same, viz. to record the Debt only out of the Testator's Goods, and the Damages of the Executor's Goods in default of the Testator's. What if the Executor Defendant confess that he have *Assets* to the value of part of the Debt, not of the whole? There for so much as is confessed the Plaintiff may pray, and have Judgment presently without Damages, and may maintain for the residue of the debt, that the Defendant also hath *Assets* for the rest, and so go to Trial; as appears both by the printed Book of Entries, and another Manuscript which I have. But what if this Trial pass against the Plaintiff? Shall he then have an additional Judgment for Damages in respect of the former? I think he shall have Costs, which commonly run with or in the name of Damages; but without a Writ to enquire of Damages, none being found by Verdicts, the Court doth not usually adjudge Damages. Yet in the Book of Entries I find 6s. 8d. Damages assessed by the Court upon a Confession in a *Writ of rationab. part. bonorum* against Exec. & this hath much affinity with an Action of debt. Yea, in the very Action of debt where the Ju-

rors

rors for miscarriage after their departure from the Bar were fined, I find that the Plaintiff renouncing the Assessement of Damages by them made, and praying the Court to assess the same, it was done accordingly: but this was a special Case.

*M. 28. H. 6.
Ro. 2. 321.
Lib. Instrat.
329. 2.*

Whereas we before shewed that an Executor denying his Executorship shall, if it be found against him, pay the Debt of his own Goods for his false Plea; this thereabout occurreth to be added, *viz.* that that is only where the immediate Executorship of the Defendant is denied. For if B be made Executor by A, and B dying makes C his Executor; now if C be sued for the Debt of A as Executor of B, Executor of A, and he denieth that B was Executor of A, which by consequence is a denial of his being now Executor of A; yet if this fall out in Trial against him, he shall not in his own Goods stand liable to this Debt, because it is possible that he might not know to whom his Testator was Executor. So if A made B, C and D his Executors, and E is sued as Executor of D, the surviving Executor of A, if E deny that D his Testator survived B and C, by consequence whereof he denieth the truth, *viz.* that the Executorship of A is de-

*See lib. Instrat.
322.*

devolved to him, yet shall not this, found against him, charge his own Goods; for he might be ignorant of this point in fact, *viz.* whether B, C, or D, lived the longest. And here he denied not his own immediate Executorship, but a mediate or more remote Executorship. And so, I think, is the Law, where C being sued as Executor of B, Executor of A, he pleads that A by a latter Testament made himself Executor, which is found against him; so as here he falsely pleaded, and pretended himself to be the immediate Executor of A, and so denied the mediate Executorship, *viz.* of B to A, and of him to B. Yet *Quære* of this: for why should not as well his false making himself an Executor immediate to the indebted Testator charge his own Goods, as well as his false denying of that Executorship; since both Pleas tend to the overthrow of the Plaintiff's Action, and each equally rested in the Defendant's knowledge? But this difference is between them apparent, *viz.* That the denial of Executorship, if true, is an utter and perpetual Bar to the Plaintiff, as against him so pleading; but the affirming of an immediate Executorship, where he was sued

sued as Executor mediate, doth not so, if true, but directs the Plaintiff to a better Writ or Action, *viz.* against him as immediate Executor to the indebted Testator.

Whereas we have before touched upon the coming of *Assets* futurely to Executors, I think it is not amiss to consider a little the form and frame usual in Pleas of Fully Administred, which thus run, *viz.*

Quod die impetr. &c. plenè administravit Lib. in. 1520
omnia bona & catalla que fuerunt prad.
S. temp. mortis sue, & nihil hab. de bonis, &c. que fuer. prad. S. temp. mortis, &c.

Thus tying his denial upon the things which were the Testator's at the time of his death, what if then the Executor have at the time of this Plea pleaded Goods which were not the Testator's at his death, but since accrued, as before is shewed; or perhaps a Lease for years sold by the Testator, upon condition to be void, if five hundred pounds not paid at such a day, which happening after the Testator's death, and Default made, the Term returneth; or, if the Executor by a Writ of Error reverse a Judgment given against his Testator for two hundred

7 H. 4. 39.
Bro. 50. This
Plea is not
good, per
Cur. because
some may
have since
accrued.

dred pounds, and so is restored thereunto? may the Plaintiff now reply generally, that he hath *Affers* which were the Testator's at the time of his death? How can the Jury so find, when the truth is not so? Surely this case is not common, nor can I shew a Precedent of a special Plea therein. But in reason methinks it should be specially, and not generally, pleaded and set forth in the Replication. And in case where one sued as Executor denieth that he was ever Executor or administered as Executor, I find sometimes the Replication general, that he did administer, without shewing wherein or how; and sometimes special, shewing what thing was administered, and where. Here note, that the Executor Defendant denying (as he must) two things, *viz.* 1. that he ever was Executor; 2. that he ever administered as Executor; the Plaintiff in his Replication is tied to maintain but the one of them, as the truth of the case is: that is, if in truth the Defendant were made Executor, but never did administer, now it must be replied that he was made Executor at such a place, without speaking any thing of his Administring: on the other side, if he did ad-

Lib. intrat.
322. a.b. but
a place must
be shewed.
So 11 H. 6.
19, 20. Br.
62.

administer, but was not made Executor, then only the Administring is to be replied. But if it shall be found that the Defendant had Administration to him committed, and so administered by virtue thereof, then is the Verdict to pass for the Defendant, for this is no Administring as Executor; and upon a general denial thereof this may be given in Evidence, as the Lord Dyer reports to have been resolved. But if the Plaintiff do in his Replication maintain both the Points, shall this make his Plea double? Methinks it should; yet I find it so replied, and no exception taken for the Doubleness, *Tr. 17. H. 8. Rot. 28.*

A Sole woman being Executor maketh a Deed of gift of the Testator's Goods in trust, but continueth possession of them, and marrieth *J S*, who also hath possession of the Goods, and in an Action of Debt by a Creditor Fully administered is pleaded; now upon Evidence the Verdict shall pass for the Plaintiff; for this Alienation, being fraudulent, was void to all Creditors, and so as to the Plaintiff the Goods continued the Testator's, and so *Assets* in the Defendant's hands, as was held in the *King's Bench*. If fully administered be

T

pleaded

*So done Co.
Li. intr.
104. b.*

*Mich. 13th
14 El. Dy.
30.*

*Lib. intra.
312. b.
Tr. 37. Eliz.*

Yet Finch
46 E. 3. f. 9.
10. held the
contrary,
viz. that
Judgment
should be of
the whole,
but Executi-
on only for
so much, and
a *Scire fac.*
for the rest
when more
Assets.

See Coke
1.8. fol. 134.

pleaded where the Defendent hath *Assets* for part, but not sufficient for all, and so it is found; yet shall not Judgment be given for the whole, but for part presently, with a farther Award, that when more shall come to the Executor's hand, the Plaintiff shall then have farther Judgment for the rest: so as that false Plea doth him no prejudice, but makes him in as good state (the charges of Trial excepted) as if he had confessed himself to have part. And I think the Plaintiff upon that confession of part may pray the like Judgment, without maintaining that the Defendent hath sufficient for the rest; for if that be not true, why should he be put to the charge of a Trial by Jury? Yea, Sir *Edm. Coke* at the Bar *Tr. 36 Eliz.* said, that where Fully administred is pleaded, the Plaintiff is not tied to maintain the contrary, but may presently pray and have Judgment to recover it when *Assets* shall futurely come to the Defendent's hands: which was denied by some. But truly methinks the Law should be as he said, as well as in the former case, where for the part which the Defendent had not *Assets* to pay, it was so done, upon Verdict so finding. But there as I conceive,

ceive, it was not a present Judgment, but an Award that he should have Judgment futurely; so as after when *Assets* come to the Defendant's hands, the Plaintiff must have a *Scire facias* against the Defendant, to shew cause, not why he should not have Execution, but why he should not have Judgment, as I take it: yea, where it is found for the Defendant that he hath fully administred, yet was it held by all the Justices 33 H. 6. 23, 24. and by *Prisor* 34 H. 6. 24. that when *Assets* after come to his hands, the Plaintiff shall have a *Scire facias* to have Satisfaction out of them: but there *Markham*, *Telverton* and *Forrescue* were of contrary opinion, and so was the whole Court 4 H. 6. fo. 4. And it stands with great reason, that where, upon a Verdict fully found against the Plaintiff, Judgment is given *Quod nihil capiat per Breve*, there he cannot have any Writ to execute the Judgment for him, but is put to a new Action of Debt: yet where it is found that the Defendant hath *Assets* for part of the Debt, but not sufficient for the whole, there it is very congruous that the Plaintiff have presently Judgment for part, & after, when more cometh, then by *Scire facias* against the Defendant obtain

So 19 H. 6.
f. 37. 8 E. 4.
fol. 25. See
Judgment
so entred.
Co. lib. intr.
151. b.

So 7 E. 4 f. 7.

Judgment and Execution for the rest : for here both Verdict and Judgment were for the Plaintiff against the Defendant, whose Plea that he had no Goods was false, and so found by the Jury. And this difference was strongly avowed by Serjeant *Hanham*, Mich. 33, 34 *Eliz.* and after approved by *Fenner* Just. 36 *Eliz.* none contradicting it : yet a Book was cited, that the Plaintiff recovering so much as was found in the Executor's hands, should be amerced for the residue; which *Popham* Chief Justice denied to be Law.

This 21 H.
6. 40, 41.

CHAP XVI.

Where Judgment shall be against the Executor's own Goods, though no Plea of the Defendant nor Vastation do so occasion : and of the several manners of Judgment in several Cases.

HOW by Wasting, called by us commonly a *Devastavit*, an Executor may draw down the Execution upon his own Goods, hath formerly been handled and discoursed of ; as also what kind
of

of Pleas do make the Executor's own Goods liable to the Debt, and what not. Now let us see where without Misadmirring or Mispleading, yet the nature of the Action shall lay the whole Debt or thing recovered upon the Executor's own Goods. And this we shall find in some few Cases. 1. Where an Executor is sued for Rent behind after his Testator's death, upon a Lease for years made to the Testator, and by him left to his Executor; here it shall be adjudged & levied upon his own Goods; for that so much of the Profits as the Rent amounted to shall be accounted as his own Goods, and not his Testator's; therefore is he to be sued as well in the *Debet* as in the *Detinet*, where in other cases he is not, but in the *Detinet* only, being sued as Executor. So if any thing delivered to or detained by his Testator come to his hands, and he still detains the same after the demand, and be thereupon sued in an Action of Detinue; for this is his own act. Nor in this case need he to be named as Executor, for he shall not answer Damages for his Testator's detaining. So if he assume to pay of his Testator's having *Assets*, and be sued upon this *Assumpsit*, the which Debt is to be recovered in Dama-

5 *Marie*,
fol. 112.

Read and
Normood's
Case.
Co. lib. Intr.
fol. 1, 3.

ges, and that upon or out of the Executor's own Goods; yet is this Action, and the Assumption, which is the ground thereof, founded in the Executorship, and his having *Assets*; for if either he had not been Executor, or if he had not *Assets* at the time of the promise, it had been *Nudum pactum*, and would not have bound him, nor given good cause of Suit. Nay, to go farther, in the case of Assumption by the Testator, & Suit against the Executor thereupon, we find the Judgment in Mr. *Plowden's* Commentary given against the Executor generally, as if he had not been an Executor, not fixing it upon the Testator's Goods; yet there the very Debt it self is included in the Damages. But contrarily was it after in the seventh year of the late King, viz. Judgment given, that as well the Damages as the Costs should be levied of the Testator's Goods, if so much in value of them were in the Defendant's hands; and if not, then the Costs only of the Goods of the Executor. And this surely is the righter and more just way: for there is no reason that upon a Promise, more than upon a Bond, the Law should cast the whole Debt upon the back and state of the Executor. But perhaps the
two

two Judgments may be reconciled thus : The latter was given upon a Verdict, *Non assumpsit*. being the Issue, and there the Jury assessed damages in certain, *viz.* 253 pounds, with the Costs ; so as here the Judgment was compleat and full, *viz.* to recover the said sum : but in the other case the Judgment was had upon a Demurrer, so as the Damages not being known, it was generally that the Plaintiff should recover his Damages against the Defendant. *Sed quia nescitur quæ damna, &c.* Because it appeareth not to the Court what the Damages were, therefore a Writ was awarded to enquire of Damages, upon the Return whereof executed, the Judgment was fully and compleatly to be given of a sum in certain : which second Judgment it appears not by the Book in what manner it was entred, and therefore might perhaps be then agreeable with the other. And that the said first Judgment before Damages enquired of is not a plenary and full Judgment, but an Award of Judgment, hath been divers times resolved ; and that therefore any defect and insufficiency in the Declaration may be shewed time enough after the first, and before the second Judgment : Yea,

*Tr. 30 Eliz.
Pasch. 33 E.
in com.
banc.*

if the Plaintiff die before the second Judgment, though after the first, the Action falleth to the ground : so if the Defendant die : otherwise of death after full Judgment. But this notwithstanding, and howsoever there were done upon the second Judgment, methinks it were righter and fitter that the first Judgment should express that the Damages should be had and levied out of the Testator's Goods, for whom and in whose right the Executor is sued.

Another Case there is wherein the Judgment must be, as it seems, against the Executor's own Goods, viz. in an Action of Covenant for a breach of Covenant since the Testator's death : for so was it held both by all the Judges of *Common Pleas*, except the Lord Dyer, and by the Prothonotaries in the late Queens time ; where the Case was of an House upon the Lease negligently burned in the Executor's time, for which Damages only were to be recovered. And sometimes where the Executor himself is to bear the burthen, I find the Judgment entred, that the sum recovered shall be levied of the Lands and Goods of the Executor.

CHAP.

So for Rent
behind since
the Testa-
tor's death.
Co l. 5. fo. 31.
The Suit is
in the Debt
as for his
own Debt,
*M. 14 &
15 El.*

Lib. imra.
329. a. & b.
*De terris &
patallis, &c.*

C H A P. XVII.

Of Women-covert Executors.

THere being two kind of persons who have some disability upon them, *viz.* Feme-coverts or married women, and Infants, touching whom we find in many places question and disceptation in our Books, we will consider of them by themselves, or apart from others; yet not joyning them together neither, but each by himself separately.

First, therefore, of Feme-coverts; touching whom we will consider these three things.

First, whether they may make Wills and Executors with or without their Husbands assent; and how, whereof, and in what cases.

Secondly, whether they may be made Executors without their Husband's assent, or how their Husbands may hinder it.

Thirdly, what acts in execution of the Executorship they may do without their Hus-

Husbands, or their Husbands, without them.

Señ. 1.

A Woman married, or Feme-covert, we know is *sub potestate viri, cui in vita contradicere non potest*, as saith the Writ given by the Law to the Wife for recovery of her Land after her Husband's death, being aliened by him. Therefore it

Sola & secreta examinata.

is that Judges, when a Woman is to acknowledge a Fine of any Land, do examine her apart from her Husband, to know whether she be willing, or come to do it by the compulsion of her Husband: It is therefore hard for her to have freedom of will, and consequently freedom to make a Will. Besides, all her Moveables or Goods personal, which she had at the time of her Marriage, otherwise than as Executrix or Administratrix, are by the Law totally devided out of her, and settled in the Husband as fully *ipso facto* upon the very Marriage, as any other that were his own before. Of

Debts except, which are not properly goods.

these therefore she can make no disposition, no more than of other her Husband's Goods. But in case she do by Will bequeath them, although the Will and Gift be void, yet if the Husband, as the case was in the time of Edward the se-

§ E. 2. Fitz. Devise 24.

cond,

cond, do after his Wifes death consent to this her Will and Gift, by delivering of the Goods bequeathed after her death, or assenting that the Legatee take them by virtue of such Will and Gift; this amounteth to a new Gift by the Husband. If a Woman have a Lease, an Estate by Extent, a Wardship, the next Avoidance of a Church, or other Chattel real; these are not devested out of her into her Husband by Marriage, but in case she over-live him, they continue to her as before, no Alienation or Alteration having been made by the Husband, who had power to dispose of them by Gift in his life-time, though not by his Will: yet such a Woman in her Husband's life-time could not of or for these things, without her Husband's assent, make an Executor or Will; but she dying before him, they would, by the operation of Law, accrue to him. And here then observe a Case, though not frequent, yet full of mischief when it happens: Suppose that a Woman indebted a thousand pounds, and having Leases and moveable Goods to the value of three thousand or four thousand pounds, marieth with J S, and then dieth before the Debt be recovered against

During her
life he is, but
not after.

gainst her ; in this case the Husband shall have and go away with all this value of his Wife, and is not in Law liable to pay one peny of her Debts, because he is neither her Executor nor Administrator, What the *Chancery* could do, or rather what the Lord Chancellor or Lord Keeper would do, in this case, I will not take upon me to say or determine. Another sort or kind of Goods, or rather Interests, a Woman may have, *viz.* Debts or things

But the Husband may receive them or release them.

in Action, which, as the former, are not devested out of her by Marriage into her Husband, nor yet can she thereof make an Executor without her Husband's assent, although they be one degree farther from the Husband than the said Chattels reals ; for that though the Husband do over-live the Wife, he shall not be entitled to them as to the former. But if his Wife make him Executor, as she may, or if after her death he take Administration of her Goods ; then, as he is thereby entitled to them, so is he liable also to pay her Debts out of the same, when he shall have received them.

12 H. 7. f. 22.
The Husband was sued in Spiritual Court as Executor to his Wife. So she is often to former Husband and to Father, &c.

Lastly, *Dato* that a Woman-covert is Executrix to some other person, and in that right hath Goods moveable ; these are

are not devided out of her, because she hath them not meerly to her own use, but as representing the person of another: But whether then may she without her Husband's licence or assent, in respect of her being an Executor, and for continuation of this Executorship, make Executors, and consequently a Will, or not? Hereabout hath been much diversity of opinion. Some Books generally speak, that the Wife may make an Executor, but speak nothing of the Husband's assent, whether necessary or not. Elsewhere we find it mentioned, that if the Husband after the Wifes death countermand (some Books, false Printed, say command) the proving of his Wifes Will, then it loseth all force, or becometh void and of no value: but in this case is no mention in what state this Wife stood, *viz.* whether she were Executor or not, no not so much as whether she had any thing in Action, or Chattel real or not, so as nothing in particularity can be grounded upon that Case. But there are expresse opinions, that the Husband's assent is absolutely necessary even in this case, so as without it the Wifes making an Executor shall be meerly void, and, consequently,

39 H. 6. f. 27.

34 H. 8. f. 8.
Bro. Testa-
ments 21.18 E. 4. f. 12.
Vavafor
Just.

quently, he to whom she was Executor shall now by her death be dead intestate. And of this opinion was *Babington*, chief Justice, in the beginning of *Henry* the sixth his time. Yet contrary hereunto was the opinion of *Fineux* chief Justice in the time of King *Henry* the seventh, viz. that where the Wife is an Executor, she may also make a Will and an Executor without any consent or assent of her Husband. And to this opinion doth Master *Perkins*, after consideration of the Books on both sides, incline. But some will say, that since all this, in the late Queens time this hath been contrarily resolved, viz. in the case between *Andrew Ognell* Plaintiff, and *Underhill* and *Appleby* Defendants; in the end of which Case it is in express terms said to have been then resolved, that a Feme-convert or Married Woman could not make an Executor without the consent of her Husband. To this I answer, that this Case is to be construed with relation *ad materiam subjectam*, viz. to the matter and point in question and under consideration, which was that state of a Woman whereof we have before spoken, viz. one having things in Action, Debts

4 H. 6. f. 31.

12 H. 7. 24. b.

Tn. Devif. f. 27.

Hil. 29 Eli. in com. ba.

Ognell's case
Coke lib. 4.
34. b.

Debts or Duties to her belonging, as there in particular it was Arrerages of Rent due to the Woman before Marriage. As for the point of a Woman Executor to another person, it was never in that Case under disceptation, no nor once mentioned in the Debate or Arguments thereupon. Now considering the very form and phrase of Judgments at the Common Law, which are thus, *viz. Ideo consideratum est per Curiam, &c.* not, *Adjudicatum est*, that is, It is considered by the Court, not in express terms, that It is adjudged; this, I say, well observed, (as to me it seems very remarkable) gives us to know, that no more is adjudged than is considered of, the Judgment being contained and clasped up in the words *Consideratum est*. Wherefore since in *Ognell's* Case the point of a Woman-coverts ability, in case where she is an Executor, to make a Will and Executor, hath not been considered of, (the eyes, tongues, nor thoughts of the Judges being once set upon it;) it cannot be that that Point is there resolved or adjudged. Besides, even in a few words expressing, as to me it seems, the reason of that resolution, it appears
not

not to have been the Intent of the Judges, that the same should reach or extend to this Case of a Woman-covert Executor: for it is added (as the reason of the Judgment, in my conceiving) that the Administration of the Wifes Goods doth of right belong to the Husband; which amounts to this, in my understanding, viz. that where the Wifes making of a Will, and consequently of an Executor, may be prejudicial to her Husband, and prevent him of some benefit or advantage, or tend to his loss and disadvantage, there it shall not be available or effectual without his assent; and therefore not in the Case of her who, having Debts or Duties to her due, would, by making another to be her Executor, exclude or preclude her Husband from that benefit which to him should pertain as Administrator of her Goods. Now as for the Goods, Debts or Credit to her as Executor to some other pertaining, no benefit could redound to the Husband by having such Administration of his Wifes Goods, for those should go and be to the next of kin of the Wifes Testator, taking Administration *de bonis non administratis* of him, if she have no
Execu-

Executor; and therefore her making Executor as touching these brings no hurt or prejudice to her Husband, and so is out of the reason of *Ognell's Case*: Since then it is so, and since the Law favoureth Wills, and it was by implication part of his Will who made her Executor, that she should have power to continue his Executorship, by making another to succeed therein after her decease, for performance of his Will; why should the Law give to the Husband, who can receive no prejudice thereby, power to give impediment thereunto? for, *Frustra est inutilis potentia*; even Reason it self flames and awards against him in this Case a *Quare impedit*, or rather a *Nou impedit*; as to me it seems. Wherefore to conclude, I take it that the opinion of *Finch* is good Law in that Point of a Feme-covert Executor, though not in the other Point, where she only hath debts or things in Action to her self due: for therein the said Resolution in *Ognell's Case*, grounded upon good Reason, gives me satisfaction to differ from *Fin.* who making no difference between the Cases, held the Husband's assent needless in both. *Posito* then that the Wife of *J S*, having Debts due to her self;

and being also Executrix to *J D*, makes without her Husband's assent *J N* her Executor, and dieth; what shall we now say? shall we say, that as touching the Goods and Credits or things in Action to her as Executrix of *J D* pertaining, this Will stands good, and *J N*, as her Executor, may prove it, contrary to her Husband's will? and that as to the Credits to her self in her own right pertaining the Will is void, and thereof her Husband may take Administration? Shall she die both testate and Intestate, with a Will and without a Will? shall she have both an Executor and Administrator? Why not, to several purposes, as well as where an Executor is made only for one particular thing or one place, the Testator may elsewhere die intestate? And so where the Executorship is divided, as before is shewed, and one to whom part is committed will prove the Will, but the other to whom other part of the Executorship is committed will not take it upon him, here must needs be a dying for part testate, and for part intestate.

As for the second Point, *viz.* Wives or Women-covers being made Executors, and so having the Office of Executorship
put

put upon them against their Husbands will, there hath also been diversity of opinions. In the time of King *Edw. 1. Brab.* ^{13 Ed. 1. Fitz. 22d. 119.} Justice saith, she may be Executor without her Husband, and the Administration shall be delivered to her only. And I think he meant that this might be without the consent of her Husband, or whether he would or not; for so it is said in the time of King *Henry* the seventh to be the Law ^{2 H. 7. 15d.} Spiritual: and indeed in Courts Spiritual no difference is made between Women married and unmarried, for ought I can find. There a Wife sueth, and is sued, alone without her Husband; he intermeddeth not, nor is intermeddled withal, touching the things pertaining to his Wife. But at the Common Law it is otherwise; and there, as *Briden* Chief Justice saith, a Wife without the assent of her Husband cannot be Executor, he meaning thereby that the Husband may oppose and hinder it; for such a one may be named Executor in and by a Will, without the knowledge of her Husband. Let us then see how after the death of the Testator the Husband can hinder her proving the will, or intermeddling to Administer, since it may be a matter both of much

trouble and danger to him to have the Executorship fasten upon his Wife, and consequently upon himself. On the other side, it may be a benefit and advantage to the Husband; and therefore we will also consider, whether the Husband may (though his Wife would refuse) assume the Executorship, and fasten it upon her. The Testator therefore being dead, and some or common bruit carrying it to the Ordinary, that the Wife of J S is made Executrix; if she come not in *gratis* or voluntarily to prove the Will, Process or a Citation is to be sent out of the Spiritual Court against her, to enforce her coming in to take on her the Executorship. She coming may clearly, as well as any other person, (especially if her Husband concur with her therein) refuse this Office, trust and charge, so as if there be no other Executor named, the Ordinary must commit the Administration. If she should not come and appear, she should be Excommunicate, as I take it, notwithstanding any allegation or intimation by her Husband of his unwillingness to have her take upon her the Executorship. But suppose she doth come into Court, and offers her self ready to take the Executorship

ship upon her; and on the other side her Husband expresseth his dis-assent thereunto, praying that she may not have the execution of the Will to her committed: what will then be done? This, I confess, pertains to another Learning, and not to that of our Profession. But forasmuch as I find, that in the Courts Spiritual a Wife stands in the same plight and state as a Woman sole, the Husband not intermeddled withal in the affairs of the Wife; therefore do I conceive, that in that Court the Husband's refusal will not be of force to hinder the committing of the Executorship to the Wife not refusing; at least if there come not a Prohibition to stay the Spiritual Court's such proceeding. But whether a Prohibition be in such a case to be granted or not, as I find no resolution in my Books, so will I not take upon me to resolve. This stands clear in the Rules of the Law of *Engl.* that the Wife is under the Husband's power, and cannot contradict him in pleading & doing other acts, even touching her own freehold: nay, she cannot take lands nor goods by gift or conveyance without her Husband's assent, as the Law hath been, and, for ought I know, is taken. But if once the

33 H. 6. 31.
43. 39 Ed.
3. 1.

27 H. 8. 24.

Will be prov'd, and the execution thereof committed to the Wife, though against her Husband's mind and consent, I think it will stand firm; and the Husband and Wife being after sued, cannot say that she was never Executrix. And I doubt whether the Wife administering without the Husband's privity and assent, although the Will be not proved, do not conclude her Husband as well as her self from saying after in any Suit against them, that she neither was Executor, nor did ever administer as Executor. Yet perhaps this Administration by the Wife, against her Husband's mind, will (as against him) be as a void act; else cannot I see how *Brian's* opinion before cited, viz. that the Wife shall not be an Executor without or against her Husband's mind, can be Law. On the other side, if the Husband of a Woman, named Executor, would have his Wife to take upon her the execution of the Will, and to prove the same, but she will not assent thereunto, (wishing, perhaps, that gain and benefit rather to some of her kindred by a way of Administration, than to her own Husband by her Executorship, as sometimes Wives accord not well with their Husbands;) in this case I think

21 H. 6. 4.
The Plea is,
that the
Wife did or
did not ad-
minister,
without
speaking of
the Hus-
band.

32 H. 6. 31.
The Hus-
band may
administer,
and prove
the Will for
his Wife.

think the Court Spiritual will not fasten the Executorship upon the Wife against her will. But *data* that the Husband, though the Will be not proved, doth Administer as in the Wife's right, but against her mind and will; shall she be now hereby bound and concluded, so as after she cannot decline or avoid the Executorship? And surely I think, that during her Husband's life she stands concluded at the Common Law, for that there she shall not be nor can be sued alone as Exec. and then being sued with him, she must joyn in Plea with him, *viz.* that she neither was Executor nor administered as Executor; and then this act of her Husband's given in evidence will, as I take it, cause that the Verdict be found against her: not so after her Husband's death; then she may refuse, as the L. Dyer saith, and citeth as resolved. These things I thought good to offer to consideration, and so leave them without resolution. Difference perhaps may be where a Woman so made Executor taketh a Husband after the Testator's death, before either proving or refusing to prove the Will, and where she is made Exec. during the Coverture; as there in case of a discent of her Land to the Heir of a Disseisor; for

1 Eliz. Dyer
166. b. there
is cited
3 H. 7. 112.
Nota per Bill.

when there is upon her such a state of Election, she, marrying before her Resolution or determination, doth upon the matter deliver it into the Husband's hands : not so where it first bindeth and falleth upon her in the state of Coverture. If the Husband were indebted to the Testator, this making of the Wife Executor is, as I take it, a Release in Law, as well as if she were the Debtor ; but if after the Testator's death she do marry such a Debtor, it is a Devastation.

The third Point.

Touching the Administration or Execution of the Office of an Executor by a Feme-covert and her Husband,

WE will now come to admit the Execution of the Will assumed by concurrent consent of Husband and Wife, and the Will proved with both their likings in the Wife's name ; and examine what acts the Wife of her self is able to do, and what her Husband without her.

It hath been conceived by many of old, and by some of late, that if a Feme-covert or married Woman Executrix release a Debt

Debt of her Testator, or give away the Goods which she hath as Executor, or deliver a Legacy bequeathed, it was firm and good; and on the other side, that her Husband's Gift or Release was of no value, for that the Administration or Execution of the Will is committed to the Wife only. And some have gone so far as to say, that she may sue or be sued without her Husband, (in the Courts of Common Law, I mean; for in the Spiritual Court it is true, the Husband is not joyned with the Wife in suit.) But the Law is doubtless in all those points contrary, as not only some opinion also was of old, *viz.* in the time of *H.7.* but also hath been in the late Queen's time resolved: for otherwise, if the Wife's Gift or Release should stand good, her act might exceedingly endamage her Husband, & make his Goods liable to the Creditors, the Testator's state being wasted by the gifts or releases of his Wife. Wherefore it was held in the said late Case, that unless due payment were made to such Women-covert Executors, their Releases or Acquittances be void, and so also their gifts and grants: yea, it was then held, that the Husband of the Wife Executrix may give goods, or make releases of debt, at his pleasure,

See 18 H. 6.
4. In Debt
the Plea
shall be, that
she hath fully
admini-
stered; and
Reply, that
she hath Af-
fett, never
mentioning
the Hus-
band.

33 H. 6. 34

33 H. 6. 31.

pleasure. But doubtless by Marriage neither are the Goods (though personal) which the Wife hath as Executor devested out of her, and settled in her Husband, as her own Goods are; nor, if she die, shall they accrue to the Husband, if no alteration were of the Property, but shall go to her Executor, or to the next of kin, being Administrator of her Testator, if she have no Executor: and so was it held in the first year of Queen Mary. Yea, though for any other Goods which the Wife had in her own right before marrying, the Husband alone, without naming the Wife, may maintain an Action of Trespas: yet touching such Goods as the Wife hath as Executor, the Action must be brought in the names of the Husband and Wife, to the end that the Damages thereby recovered may accrue to her as Executor in lieu of the Goods. So also must the Replevin for those Goods be in both their names. But although the Husband be thus named with the Wife, yet principally is it the Suit of the Wife; and therefore in such Actions, or in Debt by Husband and Wife, she being Executor, if it come to Trial by Jury, the Husband being an Alien, yet shall he not have

M. 31 El. in com. b. p. If the Husband be to avow, it must be in the right of his Wife, Executor, or Administrator. Mansfield's Case. Doctor Juchier his Case.

have Trial *per medietatem lingue*, or *alienigenarum*, that is, by half Aliens, as in other cases where an Alien is party to a Suit is to be had. And where to a Wife made Executor power is given to sell Land of the Testator's, she may sell to her own Husband, as was resolved in the time of K. Henry the seventh, where the Feoffees (it being Land settled in use,) were committed to the Fleet, for that they would not execute an Estate to the Husband according to the Wife's State. But of this I much marvel, since the Law intends the Wife so under the Husband's command and subjection, that it holds not her disposition of Land to him by Will free, nor therefore of force; and how shall this then be conceived to be but a partial Sale? Yet *volenti non fit injuria*, and he that will put such power into the hands of a Woman under Coverture, doth in a manner subject it voluntarily to the Husband's will. And it hath been held by some, that even an Infant's or Feme-covert's Conveyance in such case of necessity should stand firm and unavoidable, because of the Condition express or implied, that the State should be void if no such Conveyance made.

10 H. 7. 29.

Bro. Just.
Cui in vi. a
15. She may
sell to any
other, but
not to him.

Fenner Just.
in ba. reg.
Case. 37 El.
C. 34 E. 3.
Bro. cui in
vita 15. No
prejudice to
them, that it
be good.

C H A P. XVIII.

Touching Infants, and their making or being made Executors.

BEing now to consider of disability by Age, for want of years in persons making or being made Executors; let us first take view of the several Ages of men and women, to several purposes material in the Law, Judgment, and Respect. And first, touching a Woman: *35 H. 6. 41. b. Wausford* in Henry the sixth his time shews, and other Books approve, that she hath six several Ages respected in and by the Law. As first, the Age of 7 years, for her Father to have Aid of his Tenants to marry her. Next, nine years, to deserve Dower, that is, that in case she be of that Age at the time of her Husband's death, she shall be endowed: but not if she be any thing under those years; the Law being Physically informed, that a Woman at those years may conceive a child, but not under them. But of somewhat different opinion was, as it seems, the Parliament in the late Queen's time, when it was made Felony to have unlawful carnal knowledge of any woman-child under the

age of ten years, it being then conceived, as I think, that no such could consent.

The Age of 12 years is a Woman's time for assenting or disassenting to Marriage in more tender years had. For so it ap-

pears by divers Books; although Mr. *Littleton* have here no distinction between male and female. The age of 14 years is

a woman's time to be in wardship, or not; so as if she be any thing above those years at the time of her Ancestor's death, she escapeth wardship. The Age of sixteen

years is her time of coming out of wardship, being once fallen under it: for although had she been full fourteen, she had escaped it; yet not so being at the time of her Ancestor's death, her wardship lasteth till sixteen years, except the Lord shall sooner marry her. And lastly,

the full Age of a Woman, whereby she is enabled firmly and unavoidably to make grants or conveyances, is 21 years, as well as for the Male; before which time, be it that she being sole make a feoffment or other conveyance, or being married alien her land by fine, and her Husband of full age joyn with her, yet is it *infirm* and *avoidable*.

Now of the Male, or Man, the first Age material, and settledly resolved on,

is

3.

4.

5.

6.

1.

is twelve years; for at that time each Male is at the Leet, so swear his Fidelity to the King. This Women do not, and therefore are they never said to be outlawed, but to be waved, because they have not this admittance into the Law which Males have. This hath been, as I think, the ground of that speech, that *Women are lawless Creatures.*

2. The second Age of Males is 14 years, accounted by the Law the Age of Discretion especially material to two purposes; viz. First, that if one under that Age commit an act amounting to Felony, yet is he to stand free from the Attainder and Punishment incident to a Felon. Regularly it is thus, but, *Non est regula quin fall.* One of much less years, having attained ripeness of Discretion and discerning, shall incur the like Attainder

§ H. 7. f. 1. 6. as one of full age: as was resolved in the time of King Henry the seventh, touching an Infant but of the age of nine years, who having killed another Boy of the like Age with his knife, and then hiding the slain Boy, and excusing the blood found upon him by saying that his nose had bled; it was held by the Judges, that he was to be hanged as a Felon,

Felon, his such Non-age notwithstanding. The other point, touching which this Age of fourteen years is especially material, is touching an Heir of Lands held by Socage : for in case such Heir be under that Age, he is to be in Ward to the next kin ; but if he be of that Age, he is not to be in Ward at all, for that the Law judgeth him to be of Discretion at those years : and therefore a Guardian in Socage being in effect but a Bailiff accountable, he hath no need of such an one, other than such as himself shall chuse.

The third Age in and touching Males material is fifteen years : for every Lord of a Mannor or one having Freeholders in Socage, or by Knight's Service, when his eldest Son cometh to that age, viz. fifteen years, is to have of them Aid for the making of him a Knight, towards which every one holding by a whole Knight's Fee is to pay twenty shillings, and so ratably for more, more, and less, less ; and each holding twenty pound Land in Socage is to pay the like sum, and so ratably for more or less.

The fourth Age of Males is the full age

3.

4.

age of 21 years, which maketh him free from Wardship, having Lands held by Knight's service descended unto him; and also makes him able to alien Lands or Goods, makes firm his Bonds, Statutes, Recognizances, &c. For although at fourteen the Law judge him of Discretion, yet doth it not hold him fully ripe till one and twenty.

5.
Oblitum.
 Another of
 60. to ex-
 empt from
 being com-
 pelled to
 serve by the
 Stat. of La-
 bourers.
 23 E. 3. c. 1.
 W. 2. cap. 28.
 13 E. 1. No.
 na. Br. 165.

The last Age of Males respected by the Law is seventy years : at which time Sheriffs are to forbear to impanel them in Juries; and in case they do not, such old man may have a Writ to the Sheriff, grounded upon the Statute for that purpose made in the time of K. *Edw. 1.* commanding such Sheriff to forbear the impannelling of him, and he may have an Action to recover Damages upon that Statute. This is called by most a *Writ of Dotage*; a word, perhaps, anciently taken in a good and favourable sence, *pro dote atatis*, viz. a Gift, Priviledge or Exemption allowed to Age in favour thereof, and as a benefit. Having thus by way of ingredient or introduction taken view of these several Ages, let us now see wherein and how Age is material touching them who are to make or to be made

made Executors, and what age is required thereabout. Master *Perkins* saith, that one of four years old may make a Will, and consequently Executors; and his reason is, because the Executors being to account before the Ordinary, it cannot be intended but that the Goods shall be distributed for the good of his Soul. He speaks as if he only made an Executor by his Will, but did not bequeath any thing, but left all to the Executor's Conscience and Discretion, which is not usual, though feasible, as before have I shewed, or said at least. But admit it were so, and no Bequest at all contained in the Will; yet since at that Age an Infant hath no Discretion to elect a fit person to distribute his Goods, Money and other things, nor to make continuation of an Executorship to another, to whom perhaps the Infant was Executor; I cannot see that his Will should be of any force: but if he be of the Age of 14 years, being the Age of Discretion in the Judgment of Law, then I should hold him able to make a Will, although yet he be an Infant, till 21 years, and can make no Gift of Land nor Goods which shall be of force. And *Babington* Chief Justice, to other purpose, makes

Devise f.
97. No good reason, for one may make an ill Account, especially having a Child's direction for his doings.

9 H. 6. f. 6.

2 H.4.22.

40 Ed.3. 44.

37 H.6.5.

11 H.6.

f. 10.6.

like distinction between an Infant of such tender years, and one come to the years of Discretion. So also, as before we shewed, is it in the case of Felony. And that way also sounds that which *Hanck* says in *Henry* the Fourth his time, viz. that an Infant of 18 years old may be a Disseisor; as implying, that his years may be so tender, that, as *Candish* saith of an Infant in *Edward* the Third his time, he is not to be intended able to know or discern between good and evil: methinks therefore he should be at the least of the age of Discretion, viz. 14 years, who should be able to make a Will, and consequently an Executor. And the Custom for an Infant of fifteen years old to bequeath by Will hath, as to me it seems, affinity with this Opinion, though there the Case was of Land in a Borough devisable by Custom. And that way reflecteth the Case in the time of King *Henry* the Sixth, where it was said, that an Infant under fifteen years of Age should not wage his Law, viz. take an Oath to acquit himself of a Debt, or excuse his Default in an Action real. And farther reason of this Opinion will arise out of the consideration of an Infant made an Executor.

Now

Now touching an Infant made Executor, how young soever he be, the making of him so is not void; but yet the Execution of the Will, which is the performance of the Office of an Executor, shall not be committed to him till he come to the Age of seventeen years, by the Law Spiritual; and till then (for that he is not able to do the part of an Executor) Administration is to be committed to some other: Yet if it be a Woman-infant who is so made Executrix, in case she be married to a man of seventeen years old or more, now is it as if she were of that age, and her Husband shall have the Execution of the Will; and if Administration were before committed during the Minority of the Woman, it shall now cease, as is said in *Prince's Case*. Yet I do a little marvel at these Opinions, considering that these things are managed in the Spiritual Court, and by that Law; and it intermeddles not with the Husband in the Wife's Case: now by that Law, and not our Common Law, comes in this limit of 17 years. And I have seen it otherwise reported in and touching the last Point.

*Co. lib. 5.
fol. 29. p.*

*M. 41 & 42
Eliz.*

Farther touching Infants Executors,

Co. l. 5. f. 29.
 But pay-
 ment is to
 be made to
 the Execu-
 tor, and not
 to the Ad-
 ministrator,
 M. 15 & 16
 El. in com.
 b. Rep. 67.
 Co. l. 5. f. 29.

Co. l. 6. f. 67.

and under the age of seventeen years, this is to be noted, *viz.* that such an one is not able as an Executor to assent to a Legacy, so as it may by virtue thereof settle in the Legatee. Also if Administration be during such Minority committed with special words of Restraint or Limitation, *viz.* that it is done to the use or profit of the Infant-Executor, then no Sale of Lease or Goods, or assent to Legacy, by such Administrator, will bind or prejudice the Infant-Executor; but otherwise, perhaps, if the Administration during the Minority be committed generally. And if the Testator himself, making an Infant Executor, doth also appoint another to be his Executor during his Nonage, expressing it to be only for the benefit and behoof of the Infant-Executor; I doubt whether this temporary Executor stand any whit restrained from what pertains to the power of an absolute Executor: for there may be, perhaps, difference between him to whom the Owner of the Goods commits the government of them, though but for a time and in special manner, and an Administrator so especially made by the Ordinary, another being presently by the will of the Owner or Testator to have

have the Administration, in whom for a time legal defect is found. But now let us pass over this Age of seventeen, and consider of the Infant between that time of his being admitted to take upon him the Executorship, and his accomplishment of his full Age of one and twenty. First, then, suppose that he doth release a Debt due to his Testator; whether shall this be good to bind him, and to discharge the Debtor, as well as if the Executor had been of full Age, he now having proved the Will, and being by the Law Spiritual approved an able Executor? And this Point coming in question in *Russel's Case* in the late Queen's time, consideration was had of divers good Reasons for enabling of this Release; as that an Executor represents the person of his Testator, and in his right and power doth these acts and not in his own, and therefore his Infancy, which is a state or condition of his own natural person, shall no more disable him than it doth the King, a Major, or other Head of a Corporation.

Also divers Books were found to run that way, as well in the case of an Infant, as of a Feme-covert. But upon great deliberation in the *King's Bench*, and

H. 26 Eliz.

*16 H. 6. Re.
45. 21 E.
13. 24.*

Co. l. 5. f. 27.

upon conference had with the Lord *Anderson*, *Manwood*, and other Justices, it was resolved and adjudged, that the Release of an Infant Executor, without payment of the Debt and Duty, would not bind or bar him. 1. For that if it should, it would be a Wasting or devasting of the Goods of his Testator, & so would charge his own Goods. 2. It would be a wrong, which an Infant could not do by his Release. 3. It was no pursuit nor performance of the office or duty of an Executor, but the contrary. And upon this Judgment a Writ of Error was brought in the *Exchequer-chamber*, where it was agreed by all, that the Release was not effectual nor binding, so as this Point now had the Resolution of all the Judges of *England*. But it was agreed, that if payment or satisfaction had been made, then the Infant-Executor might have made a good Acquittance and Discharge; and indeed, Payment it self, if proved, brings Discharge enough, except in the case of a single Bill. Note, that the principal Case adjudged was not a Release of any Debt or Duty, by Specialty, but of Trespass in conversion of Goods found or taken in the Testator's life time. But *posito* that this Infant

Infant had assented to a Legacy, whether will this bind him or not? For in the Case of *Russel* it is said, that all things which an Infant doth according to the Office and duty of an Executor will stand firm; now it is part of his Office to pay and execute Legacies. Yet since this act amounts to a Vastation or wasting of the Testator's Goods as well as the other, in case there remain not Goods sufficient for payment of the Debts, and consequently here, as well as in the other Case, the Infants own Goods would become liable to his Testator's Debts; I doubt, and incline, that it is not, nor can stand effectual: for except in the other we admit a want, or possibility of want, of *Assets* or Goods, the Release could neither hurt the Infant himself, nor do wrong to any other; and that admitted, this Case is of like prejudice. Yet if these *Assets* should be void, so also would be his payment of Legacies: and how then were he an able Executor at the age of seventeen years, to sue and to be sued for Debts and Legacies? And if upon Suit it cannot be shewed that Debts will take up all, or disable the payment, then, haply, he may be forced to pay. *Quere*, notwithstanding, whether

these Acts (though voluntary) stand not good upon *Bene esse*, or conditionally, *viz.* if there be besides Goods sufficient, &c. or that else the non-aged Executor may have an action of Accompt for the mony by him paid to the Legatee, and also avoid his Assent, where that is only needful. But doubtless, neither the Assent of such Executor before his Age of 17. nor any payment of a Debt to him, could be good, although such acts to or by another Executor before the proving of the Will would stand firm and good; for this Infant wants not only proving, but also ability to prove his Testator's Will; yea, the Will stands suspended, and the Testator as it were intestate, whilst the Administration stands in force, so as during that time nothing can be done by any as Executor: and therefore there is great difference between the Cases. What if payment of a Legacy be made to an Infant, can he make a sufficient Acquittance? This, I confess, is besides the Point in hand; yet because it concerns Infants and Executors (though not Infant-Executors) it is not amiss here to cast some thoughts and words upon the Point, for that it many times perplexeth both Exec. and Legatees. First, therefore, in case the Infant be of the years

years of Discretion, viz. 14, I hold it clear, that any Payment to him made will stand good; for that the Law at that age holds him able to govern and manage his own Lands held in Socage, and consequently to receive the Rents thereof: wherefore, whether he who makes such payment have any Acquittance or not, if he have proof of the payment, he is well enough acquitted from any second payment; and if without payment he get an Acquittance, it will not suffice, the Infancy of him who makes the Acquittance considered. Besides, if the Acquittance be, as most usually they are, but signed only with the name of the maker, and not sealed, it is only an evidence or proof of payment, and no pleadable Acquittance, because no Deed; so as it nothing differs from proof by Witnesses, save that it is not mortal, as they. But now if the Infant be under the years of Discretion, what shall we say to a payment to him, especially if he be but 3 or 4 years old, or thereabout? Here I think caution is to be used by the Exec. generally; and the surest way is, if he fear to keep it in any respects, to pay it into the Court where it is recoverable, viz. where the Will was proved; yet the Case so may be, as that this pay-

Notes of
Receipts,
called Ac-
quittances.

Sg. etc.

payment may not be at all safe for the Executor. As put the case that he entered into Bond or Statute, to pay all Legacies by such a day to the several Legatees; here, I think, the payment into the Court Spiritual sufficeth not, for that must make the Receipt to be with some charge, which is in some kind an Abatement: there I think therefore, legally to secure the Executor, the payment must be to or in the presence of the Guardian, because of Nominature, viz. him or her who hath (though not as Guardian in respect of Lands) the Custody or Education of the Infant; for otherwise, to pay it into the hands of such a tender Infant, separate from any Governour or Guardian, were to expose it to loss, both for that he is not able to count the sum, and for that he, yet not being come to discerning years, were like, with *Aesop's* Cock, to part with Pearls or Coin for Plums and Trifles of no value. But in case no Bond nor other collateral Penalty lie upon the Executor, or in case the Bond or Statute be only to perform the Will generally, which nothing alters the course of payment which by the Will the Law lays upon Executors; then is not the Executor put to any such payment, nor

nor need pay without Demand and Acquittance, as in case of payment upon a single Bill, or of Rent-seck, where no Distrels can be taken, nor other Penalty incurred. Yet in that case, if Demand be, and Acquittance ready to be given, let the Executor take heed, in case he be bound to performance, that he stand not upon the invalidity of the Acquittance in respect of Nonage; for, as I have said, proof by Witnesses may supply a nullity of Acquittance, and much more the Weakness or Imbecility: payment according to the Testator's appointment being the matter which acquitteth the payer, and this the Executor may have testified under the hands of divers Witnesses expressing circumstances, so as all dying, he may continue safe from second payment as well as if an Acquittance had, the Witnesses whereunto are subject to mortality as well as the other. But herein Courts of Equity do often interpose helpfully for them who seek not evasion from payment, but only security in paying. And of Infant-Executors, and, by occasion thereof, of Infancy in Legators or Legatees, thus much.

CHAP. XIX.

Of Legacies.

ALthough these be not recoverable at and by the Common Law, but most naturally at and by the Law Ecclesiastical; yet by Suits in Courts of Equity, as the *Chancery* and *Court of Requests*, they are often obtained, and of many things touching them the Common Law taketh notice, and hath manifold occasions so to do. We will therefore consider thereabout these parts or Points, some whereof have been in part before touched upon other occasions.

1. Whether any Legacy in certain, and lying in preder, may be taken or had, without the Executor's assent by the Legatee, or him to whom it is bequeathed.
2. When an Executor can or safely may pay, deliver or assent to a Legacy.
3. Whether one Executor alone may do it; and what if the Executor be an Infant, or Woman-covert.
4. What shall amount to an Assent of the
Execu-

Executor, and what to Disassent or Disablement of assent.

How a Lease or Chattel real may be given to one for a time, with remainder to another; how not.

Where an Assent to the first, or one part of the Bequest, shall imply or amount to an Assent for the residue.

Of the manner of Assents, and therein of Assents conditional.

What manner of Interest he in the Remainder of a Lease after the death of another hath during the life of that other; and whether he may dispose of it during that time, and how.

Whether this Remainder can be defeated by any act of the Devisee for life, or by the death of him in Remainder first.

By what acts or accidents a Legacy may be forfeited or lost, and therein of Revocation, death before, &c.

Whether the Executor's Assent shall have relation to the Testator's death, and shall make good a Grant before made by the Legatee.

As for the first, we have before shewed the Assent of the Executor to be necessary before any Legacy can be had, for that Debts are first to be paid, & that the Exec.

5.

[6.

7.

8.

9.

10.

11.

If the Exec. give it to another, the Legatee hath no remedy at the Common Law, per Prisot, 37 H.6.30.

is

is to look to at his peril. But hereto add a little out of M. *Swinborne*, a learned Civilian, who saith, that in case any Goods be in the hands or custody of *J S*, and the Owner doth bequeath them to him, then may he keep or retain them against the will of the Executor, so as there be other sufficient Goods in the hands of the Executor for payment of all Debts; but though thus (as it seems) it would stand in the Ecclesiastical Law, yet for that no property is transferred to the Legatee without the Executors assent, therefore, doubtless, the Executor may at the Common Law recover the thing withheld, or Damages to the value, against the Legatee detaining it. Another Case there is, wherein, as the learned Civilian saith, the Legatee may take to him the thing bequeathed lying in preder, *viz.* Horse, other Beast, or piece of Plate, or other like thing known, and in being; and that is, where the Testator doth expressly so appoint by his Will. But herein, doubtless, the Common Law, at and by which Debts are recoverable against Executors, will oppose the Law Spiritual: for else by such appointment the Testator might cause all his Goods to be taken by Legatees, and that none

none should remain to pay Debts. Yet if there be other Goods besides sufficient for payment of Debts : then indeed I see not how the Executor can hinder such taking, without violating his Oath taken for performance of the Will. If any say, that it is also a breach of Oath in the other case ; I say, he observeth not that there that clause in the Will, being against the Law, is void, and consequently, there is a Nullity upon it, and it is as if no such thing were in the Will, and so the Oath extends not to it. And as a Chattel shall not be transferred to a Stranger without the Executor's assent ; so if the Devise be to the Executor himself till he elect to take a Legatee, it shall be to him as Executor, as appears by the strain and Argument of two Cases in *Plowd. Comment.* And more lately in the *King's Bench*, the Point being divers days argued, was at last so resolved by three Judges against one. And the reason of *Coke* at the Bar was very good, for here the Executor sustains two persons, viz. an Executor and Legatee, and so all one as where the Bequest is to another, for, *Quando duo jura concurrant in una persona, æquum est ut si essent in diversis.*

Welchden & Elkington, Paramour & Iardy, Portman and Simmes Case Trin. 37. El. All but Gurdy so agreed.

As

21 El. Dyer
867.

Co. li. 3. f. 19.

As for the second Point, it may have these two parts : First, when the Executor is able to give such assent to a Legacy; and secondly, when he may do it with safety. As for the first, he is able before Probate of the Will to assent unto the Execution of a Legacy, as elsewhere is shewed, and that although he be not of full age of one and twenty years : but if he be under seventeen years, so as he is not able to take upon him the office of an Executor, and therefore Administration is during that time to be committed to some other ; here his Assent is not of force or effectual, as we find, in *Prince's Case*, to have been held in the Case of *Pigot and Gascoin*. As for the second part, till all Debts be payed, the Executor may not safely consent to put the Legatee into the Lease or Chattel devised ; no more than he may pay money bequeathed, if there be not sufficient also to pay all Debts. Of these things more is said elsewhere. Yet because the Reader, or he that desires direction in these Points, will look for them under this Title. I thought not good here to be altogether silent touching them.

As for the third Point, viz. Whether the

the Assent of one Executor, where there be many, be sufficient; I see not how to doubt: since any one Executor may give away any Goods of the Testator's, or release any Debts due to him, therefore much more assent; which is no more or greater work, in effect, than an Attornment of one Lessee upon a Grant of a Reversion. And if there want to pay Debts, he only who assented shall answer for it of his own Goods, and not his Companions. But if this Executor be either under the age of seventeen years, or under Cöverture, viz. a Woman married, such is not able to give a good Assent to bind the others, no nor themselves, for then thereby the Infant might draw a Debt upon himself, and the Wife upon her Husband, by assenting to or paying of a Legacy, there not being sufficient Goods to pay all Debts. But the Husband's Assent is sufficient where the Wife is Executor; for his act, whom she hath chosen to be her Head, may prejudice as well her as himself; yea, though she were within Age, yet he being of full Age, his Assent will stand good. But if he or another Executor in his own right be above 17 years of age, or else under 21, I doubt whether now

6 H. 7. 5. If the Bequest be to one of the Executors, he may take it without assent of his Companions; yet if a Debt, his Companion may release. H. 48 E. 4. 14, 15. So held where but one of the Executors during Non-age assented, in the Case of *Abbotrick and Chappel*. H. 9 Jacob. Rot. 87. in *ba. reg. C.*

See *Co. Lib.*
Int. 159. the
 Executor
 being Devi-
 see for life,
 said the o-
 ther should
 have it after
 her death,
 and he en-
 tred, and
 took Admi-
 nistration,
 she dying in-
 testate, yet
 held *Affets*
 in him.
This M. 19
H. 7. Rot. 318
See Lint. 321
 One gave the
 third part of
 his Goods to
 A, with
 whom the
 Executor
 accounted
 for the A-
 mount and
 A sued for
 that sum in
 Debt; but no
 Judgment
 upon De-
 murrer. *Tr.*
37 El. in ba.
 r. Where
 Bequests to
 the Execu-
 tor himself.

his Assent will be sufficient at least except the case be put, that there be *Affets* sufficient, which perhaps there may be material, though not in the other. See more hereof after in the Title of Women-covert and Infants Executors.

As to the fourth Point : first, there may be an Assent and Election implied as well as express : for if in the Devise or Bequest the Legatee be appointed to do some act as in respect of the Legacy and the Executor doth accept the performance thereof, this amounteth to an Assent. So if the Devise be to an Executor for the Education of some Children, which he doth accordingly educate, this makes an Election to have the thing by way of Legacy, and not as Executor, as appears by the Case of *Paramour* and *Yardley*, *Plowd.* 543. So if an Horse be bequeathed, and one offering to buy him of the Executor himself, he directeth him to go and buy the Horse of the Legatee, or if the Executor himself offer money to the Legatee for the Horse ; this implieth an Assent that it should be the Legatee's by the Will: and so was it held in the Case between *Low* and *Carter*, where the Devisee of a Term did grant it to the Executor ;

cutor; and this Acceptance of a Grant from him was held to imply the Executor's Assent, that it should be his to grant. But I see not well how that should be Law which in the later part of the *L. Dyer* is found *viz.* Where a Term was devised to *J. S.*, and he was made Executor, and after the death of the Testator entered and occupied the Lands a whole year without proving the Will, that this was an Election to have it as Devisee, and not as Executor. For, first, he had good right to the Term as Executor before Probate, and so might clearly in that right have taken the Profits, although it had not been devised or bequeathed to him, and that before any Will proved. Secondly, he could not by right have it as Legatee, without Assent of himself or some other as Executor. Therefore this general Acceptation can determine no Election, as elsewhere is held. As for Dis-assent or Disablement to assent: As if the Executor do once declare his Assent that the Legatee shall have his Legacy, he may then enter into it or take it, notwithstanding the Executor's Countermand or revocation of his Assent after; so, on the other side, I think, if he fully and expressly deny that the Legacy shall take effect,

Tr. 37 Eliz.
If he by Will
bequeath it
to *J. S.*, this is
an Election
to have it as
Legatee.

he cannot after make a good Assent thereunto, for that Election once made must stand peremptory, be it Refusal to assent, or Assent. Yer *Quare* of this, for that the Refusal to assent may be checked by Sentence or Decree in the Spiritual Court or Court of Equity, and so an Assent be enforced. But if the power of Assenting be legally lost by the means aforesaid, viz. disabled, I see not how any legal Interest can be transferred by that compelled Assent, howsoever decreed.

So if the
Executor
take a new
Lease, his
Assent after
is void.

Tr. 37 Eliz.
Carter's
Case 19 El.
Dy. 359.

And what is said of a Legacy bequeathed to another, the same may be understood in case where the Bequest is to the Executor himself, and he makes his Election to have it as Legatee, or as Executor. But if where an Horse is bequeathed to A, the Executor after the Testator's death doth ride the Horse, or use him in the Coach or in the Plough, I do not take this to be any such Disagreement to the Execution of the Legacy, as that the Executor cannot after assent to the Legatee's having thereof, no more (though it be somewhat more) than where a Drinking-cup is bequeathed, and the Executor after the Testator's death doth use it to drink in: nay, if a Lease of Land be bequeathed to A, and

and the Executor continueth the Departing of the Testator's Cattel therein ; yet is not this any Disagreement to the Execution of the Legacy. But if this Lease-land were let out by the Testator from year to year, and the Executor dischargeth the Tenant, and taketh it into his hands at the year's end ; this I conceive to be a Dis-assent to the Legacy : and so also perhaps may his taking or distraining for any Rent thereupon due after the Testator's death. Yet am I not resolute that the Dis-assent is so peremptory and unchangeable as the Assent, remembring the Case in *K. Henry* the eighth his time, where a Term being granted by a Lessee conditionally, so as the Assent of the Lessor could be had by such a day ; though the Lessor's Assent were at one time denied, yet might it be yielded at another, so as it were at any time before the day. But yet there it was held, that if no time of Assent were limited, then one expresse Denial or Refusal would be peremptory, so as the Refusal were expressed to the party to whom the Assent was to be given ; otherwise, if it were but in speech to or amongst Strangers. This and the former Case 19 *Eliz.* give the best light to this Point that

14 *H.8.23.*

Dy.359. After choice once made, no variation

I remember. Now for Disablement to assent, it was held in the forementioned Case of *Low* and *Carter*, that where a Term is bequeathed to *A*, and after the Testator's death the Executor takes a new Lease of the same Land for more years in possession, or to begin presently; now by this was the Term left by the Testator surrendered and drowned, so as it could not pass to *A* by the Executor's Assent after.

As to the fifth Point, *viz*, In what manner a Lease for years or other Chattel real may be bequeathed to one for a time, with Remainder to another; it hath been heretofore much doubted, when a Lease for years was bequeathed to one for life, or for so many years as he should live, whether the limiting of a Remainder thereof after his decease were of any validity in Law or not. And this Doubt had this ground: Any State for life in the Judgment of Law is greater than any Term for years: therefore when a Termer hath by his Will given his Term or his House or Land which he so holdeth for years to one for life, or for so many years as he shall live; this Testator and Devisor hath not in the judgment of the

the

the Law any Estate remaining in him ; and therefore it was thought very hard for him to give or limit a Remainder to another. But after many arguings and debatinges , it was in the late Queen's time resolved, that such a Remainder was good ; and that if the first Devisee died before the Term expired, that then he to whom the Remainder was limited might enter and enjoy the residue of the Term. As for the giving of part of the years to one , and the residue to the other ; viz. if the Term being twenty years, the Lessee bequeathed ten thereof to his Wife, and the Remainder to his Daughter ; of this no doubt ever was but that it was good : for that after the first State limited, there remained a farther Term, viz. ten years more in the Devisor, whereof he had power to dispose ; whereas in the other Case, after the Term limited to one for life, there remained but a possibility that this life should not take up the whole Term. But now, put we the case a third way, viz. that the Termor deviseth or bequeatheth the thing in Lease to one Child in tail, with Remainder to another, and dieth, and the first entreteth and dieth without issue ; now

Plow. Com.
520 & 522.

whether shall the next in Remainder or the Executor of him so dying have the Term residue? And this Case came in question and was adjudged about the middle of King *John* his Reign in the *Exchequer*: for there, Master *Hamond* holding by Lease for years from the Crown the Manor of *Akers* in *Kent*, devised the same by his Will to *Alexander Hamond*, his eldest Son, and the Heirs-males of his body, with Remainder to *Ralph Hamond*, another Son, in like manner, and the like Remainder to *Thomas Hamond*, and made the said *Alexander* Executor, who after his Father's decease elected to take as Legatee, and after *Ralph Hamond* died, leaving Issue male, and making his Wife Executrix: *Alexander*, not having Issue male granted the whole Term by Deed to *B* and *C* for the behoof of himself and his Wife during their lives, and after to the use of his youngest Daughter, whom Sir *Robert Lewkenor* married. Then *Alexander* dying without Issue male, the Wife and Executrix of *Ralph Hamond* entred, claiming the Term, and being kept out, sealed a Lease; whereupon an *Eject. firme* was brought, and a Jury appearing at the Bar in the *Exchequer*, found a special Verdict

Both *Alexander* and *Ralph* were Executors; but that makes no difference

dict in effect *ut supra*. And in argument of this Case, first the main Question was, whether the Case were all one in Law with the former, where a Term was devised to one for life, with Remainder over, so as by the death of *Alexander Hammond* without Issue male the Term should go to the next in Remainder, as in the other Case, by the death of the Devisee for life, dying within the Term, it should do? And on the Plaintiff's part it was unged to be all one, so that by virtue of the Bequests *supra*, *Alexander* had an Estate to him and his Executors only so long as there should be Heirs-males of his body; and he dying without such Issue, the Term remained to the Executors of *Ralph*, who had the Remainder in like manner, and left Issue male, which still lived, & so that State of *Ralph* yet had continuance. For it was admitted by the Counsel on that side, that the Term could not go to the Issue male of *Ralph* according to the words and intent of the Will, since it was impossible to make a Term to descend without an Act of Parliament. This therefore they said the Law should work, which was nearest to the intent, *viz.* that after *Alexander's* death it should

go first to his Executors and Assigns. so long as Issue male of his body doth continue; and for want of such Issue, then to *Ralph*, his Executors and Assigns, so long as his Issue male should last: and therefore in this case, the Issue male of *Alexander* failing, the Executor of *Ralph*, whose Issue male faileth not, should enjoy the Term; and so Judgment ought to be given for the Plaintiff being Lessee of that Executor. On the other side it was said by the Defendant's Council, that this Case differeth much from the other Case, where the Term or Land held by Lease is given but for life to the first, with Remainder to another; which Case, as having been often resolved, was clearly admitted to be good Law; for in that Case the intent of the Testator might and did take effect. But in this Case, if the Land should go to the Executors and Assigns of *Ralph Hammond*, it must go against the intent of the Testator, whose mind and will was, as it appears by his word, that it should go only to the Issue male of one Son after another, and not to any Executors. Now then, since this intent was so contrary to the rules of Law, that it could not take effect, there-

therefore it must be void, and so all the words of Heirs-male standing void, the Will is to be construed as a sole and absolute Gift and Bequest to the said *Alex.* and consequently the Term must go to his Executors and Assigns. And for this Point, resemblance was made to a Case resolved in the *King's Bench*; where a Lease was made by Indenture to *A*, *Habend.* to *A*, *B* and *C* for their lives: now because *B* and *C* could take nothing, it was resolved that *A* should not have it for their lives, but for his own only. This Case was said to come very close in reason to the Case in question: For as here the intent of the Lease was that *B* and *C* should be estated for their lives, and, since that could not be, therefore the naming of them should be utterly void, and as if they had not at all been named, and their Lives shall not stand as a measure for the Estate of *A*; so in the other Case the intent of the Will being, that the Lease or Land leased should go to the Heirs-males of the body, first of *Alexander*, and after of *Ralph*, since this cannot be, therefore the words and name of Heirs-males should stand for a mere Blank and Cypher, and not to mea-

Windsmore
and Holford
vel Holbord
M. 28 & 29
El. argued,
and Tr. 29.
El. adjudg.

measure out any State to the said *Alexander* and *Ralph*, and their Executors and Assigns. Also it was said on the Defendent's part, that an Estate for life in the judgment of Law is of so short and uncertain continuance, that if *A* make a Lease to *B* for his life, and after makes a Lease of the same Land to *C* for years, now shall not this later Lease be void absolutely for any part of the Term, but shall stand in expectation of the death of *B*, and, as soon as he dieth, shall take effect immediately: whereas if the Lease to *B* had been for ten years, or any like Term, then the Lease to *C* should have been void for so many years of his Term. Thus it appears that a State for life is very momentary in the judgment of Law, and not reputed of any certain continuance so much as for a day. But, it is otherwise of an Estate-tail, so that if *A*, having given Land to *B* in tail, doth after (without Indenture which makes an Estoppel) make a Lease to *C* for 21 years, and then *B* dieth without Issue during the Term, yet shall not the Lease take effect, because it was utterly void at the first making. For an Estate-tail, being a state of Inheritance, may in the indentment

ment and Judgment of Law have continuance for ever, as appears both by the Case of *Adams* and *Lambert*, where it is held within the Statute of Chanteries, which speaks of Gifts to have continuance for ever. Therefore a Reversion upon an Estate tail is no *Assets*, nor giveth cause of Receipt; otherwise in all these Cases it is touching a Reversion expectant upon a State for life. Again, it was said by the Defendant's Council, that an Estate may be limited to *A* and his Heirs during the life of *B*, with Remainder to *C*, as in *Chudley's* Case was resolved: but if Land be given to *A* and his Heirs so long as *B* shall have Heirs of his body or Heirs-males, with remainder over to *C*, this Remainder is utterly void. So as there is in the Judgment of Law a great difference between the largeness and continuance of an Estate-tail, and of an Estate for life. And if (which is worth the observing) a Fee-simple cannot afford a Remainder to be drawn out of it after such a Gift to one and his Heirs, during the continuance of an Estate-tail, or of the measure thereof; much less can a Term yield such large thongs to be cut out of it, as a Remainder after an
Estate

at H. Dy. f. 7 Estate to one so long as he shall have Heirs of his body, or Heirs-males, which is all one. And in this Case the Remainder was held void by *Baldwin* and *Shelly*, though *Englefield* were of contrary opinion, as the Lord *Dyer* sheweth. Farther it was said, that if such a Conveyance by Will should stand good, it would raise a Perpetuity, not to be cut off by any Recovery,

But whereas the Case of *Hammond* hath been related before, so as by way of admittance it was argued as a Gift and Bequest to *Alexander Hamond* and the Heirs-males of his body, with Remainder in like manner to *Ralph*; the truth of the Case was, that the words of the Will were only to *Alexander* and his Heirs-males, (not speaking of his body) and so to *Ralph*; which, as was urged by the Defendant's council, made the case stronger against the Plaintiffs: for admit that the former way *Alexander* should have had but a State determinable upon the continuance of his Issue-males, yet here not so; since the reason why in Wills, such a Devise being made, the Law should supply the words (*of his body*) is only to make an Estate-tail to the Issues male,

according to the Testator's Intent. Now in this case of a Term for years so bequeathed, no Estate-tail could possibly be, though these words had been in the Will; and therefore the motive to the Law failing, no such supply will be made by the Law, since it would be to no purpose: consequently, here was neither State-tail, nor Issues or Heirs-males of the body, on whose continuance this State of *Alexander* should be determinable. Therefore it was an absolute and total Bequest of the Term to *Alexander* for ever, viz. so long as the Term should continue; for as a Bequest to one for ever is as much as a Bequest to him and his Heirs; so a Bequest to one and his Heirs is as much as if it had been to him for ever.

And this Case, after six Arguments on each side at the Bar, (if I much mistake not) was upon argument by the Barons adjudged for the Defendant by the Lord chief Baron *Tanfield* and Mr. Baron *Bromley*, Mr. Baron *Denham* (who only heard, as I take it, one Argument on each side, made of purpose in respect of his coming into his place, after the former Arguments) being of the

the contrary Opinion: and the Judgment proceeded upon the Point formerly touched, that, as this Case was, the state of *Alexander* did not end by his death, and remain to the Executors of *Ralph*. Other Points were stirred, which will be touched upon in other Divisions after, in this Chapter. It will be observed that I do more fully express reasons and points enforced on the Defendent's part than on the Plaintiff's, wherefore let these two reasons be accepted. First, that I better could relate that than the other, being the first who argued for the Defendent, and hearing little of that which was by others said on either side after, nor hearing the Court's; *nec ad hoc conductus, nec pedibus fortis*. Secondly, the labour did lie on the Defendent's part, to prove that this Case differeth from the common Case of Devise to one for life, with Remainder to another.

We are now come to the sixth Point, *viz.* that where House or Land held by Lease, or the Profits thereof, or the Lease or Term it self, which in a Will makes no difference, is bequeathed to *A* for life, or for some part of the Term, with the Remainder to *B*, and the Executor assigns

sents that *A* shall enjoy his Bequest, whether this shall enure to *B* also, since without the Executor's Assent no Legacy can take effect. And it hath been resolved that this Assent shall be effectual as well to all the Remainders as to the first Estate: and so, according to former resolutions, it was admitted in *Hamond's Case*; that *Alexander* his Assent to take as Legatee sufficed (if the Bequest had been good) for the Remainder to *Ralph* and others. And the reason of this doubtless is, because here the particular Estate and the Remainder are all but one Estate in Law; they make but one degree in a Writ of Entry, nor shall have but one year and a day to enter for Mortmain. And an Attornment to the Grantee of a Rent or Reversion for life with Remainder over doth enure also to the Remainder, which being Assent hath much affinity to that of the Executor, each tending to perfect the Grant of another man. Now then, whereas it was urged in *Hamond's Case*, that the State limited to *Ralph* should take effect, not as a Remainder, but as a new Estate to commence futuramente, viz. when *Alex.* should be dead without Issue male: if it could be admitted to be so, then could

Plow. 345.
6 Co. lib.
10. f. 47.

not the Assent of the first State to *Alexander* have enured to this, since to *R* in Remainder it worketh as being one State with the first, which reason must fail the other way. This difference between a Remainder and new Estate future brings to my mind the Case of a Rent by way of new Creation, granted by *C* out of Land to *A* for life, or in tail, with Remainder to *B*. In like manner it hath probably been held, although this Limitation to *B* cannot be good by way of Remainder, because *C* had no Estate in the Rent remaining with him when he made the Grant to *A*; yet should it be good by way of a new Grant and Creation to commence futurely. But this doubtless cannot so be but with a difference. For if the Grant were by Indenture between *C* on the one part, and *A* only on the other part, now *B*, being no party to the Deed, can take nothing by it, except by way of Remainder, but if he were party to the Indenture; or if the Grant were by Deed-poll, to which all men are alike parties, then it haply may enure as a future Grant to *B*. This is not impertinent.

Now as the Executor's Assent to one cannot enure to another, though of the same

same thing, 'except by way of Remainder; so neither can it any way where the things are not the same, except in very special cases. As if a Testator bequeath a Rent to *A*, and the Land it self to *B*, the Executor's Assent that *A* should have the Rent is no Assent that *B* should have the Land: Yet I think the Assent that *B* should have the Land doth imply the Assent that *A* should have the Rent. 1. For that the Restraint imposed by the Law against the pailing of Chattel by a Will without the Executor's Assent being out of respect to the payment of the Testator's Debts, now if the Land shall pass to *B*, it is no more available to the Testator's Debts that it pass discharged of the Rent, than charged. 2. Since the Gift and Bequest was of the Land charged with the Rent, therefore if this Bequest shall take effect, it shall carry the Land according to the Testator's intent, viz. with this Charge upon it: for what else doth the Executor in this, but assent that the Will of the Testator herein doth stand and take effect? and consequently *B* must take the Term according to the Will, and not in any different or contrary manner.

Plow. Com.
521. in Bret
& Rigden's
Case. So of
Common, or
other profits

Next we are to consider of the manner of Assents by Executors, which hath some affinity with the fourth Point. But here we shall consider only of Assents conditional. Now to this purpose we will cast our eyes upon two sorts of conditions, *viz.* precedent, and subsequent. As for the former, an Executor may to a Legatee absolutely give Assent upon a Condition precedent, as thus: I am content, that if you can get and bring in to me such a Bond wherein the Testator stood bound to *£* *s.*, that then you enter upon the Term, or take the Corn or Cattel to you bequeathed. So of other like Conditions which may precede the Assent: as, If you can get the Assent of my Executor, or, If you will pay the Arrerages of Rent to the Lessor behind at the Testator's death, or, If you will pay the wages already due to the Servants attending about the Cattel or Corn to you bequeathed. In this case, if the Condition be not performed, there is no Assent, and therefore the conditioning in this manner is good. But if it be on a Condition subsequent as thus; I do agree that you shall have the thing bequeathed to you, provided that you shall pay so much yearly to me, or to such a Creditor of the Testator;

tor;

tor; now the Legatee entring into or taking the thing bequeathed, shall not lose it again by failing to perform the Condition afterwards; for the Executor by his Assent cannot make that Legacy conditional which the Testator gave absolutely, no more than he can make the Bequest to be absolute which the Testator gave conditionally, except by a Release made of the Condition. As in other things, so in this, the Executor's Assent is like to the Attornment of a Lessee, which cannot be upon a Condition subsequent, where the Grant is absolute or without condition, though yet he may to his Attornment prefix a Condition precedent.

In the eighth place we are, touching the Bequest of Leases or Chattels real, to consider what manner of Interest one to whom a Remainder of a Term after the death of another is limited hath, and whether he may grant the same or dispose thereof during the life of the first. And as to that it is clear that he hath but a possibility of Remainder, for that possibly the whole Term may be spent in the life of the first, to whom during his or her life it is bequeathed: now a mere possibility is not grantable. Therefore was

2 Eliz. Ful-
sey's Case.

Lampet's
Case. Co.
li. 10. fo. 48.

it resolved in the late Queen's time, where he in Remainder granted or sold His State or Interest to another during the time of the first, that this Grant was utterly void, because a Possibility cannot be granted. But whereas some opinion in that Case was delivered, that this Possibility could not be released, no more than granted; it hath since been resolved, that he in the Remainder, by his deed of Grant or Release of the Devisee for life, may make his Estate, which before was determinable by his death, to be now absolute, so as it shall continue to his Executors, Administrators and Assigns, after his death during the whole Term. It may be that what was conceived, in the said Case of *Falsely*, negatively of the validity of a Release by him in the Remainder, might be meant, or perhaps expressed of a Release to him in the Reversion: but surely (methinks) though he could not surrender, yet his Release or Defeasance to him in Reversion or Remainder, having the Free-hold or Inheritance, should dissolve or destroy this Term residue after the death of the Devisee for life, so as there the Free-hold should be discharged thereof. But *Que-*

re. for I have not known this in question. As for the other Point of *Fulsey's* Case, it was in the said latter Case of *Lampet* confirmed and admitted for good Law, viz. that this Possibility of Remainder could not be aliened nor conveyed to a Stranger.

Now we are come to the ninth Point, viz. to examine whether any act of the Devisee for life can frustrate or defeat him in the Remainder of the Term, and whether the act of God, viz. by the death of him in the Remainder before the first Devisee for life, shall defeat it. As

to the first, it hath divers times been resolved, that no Grant made by the first man can cut off or defeat the second, though formerly it were held otherwise: but according to the late Resolution was it also held or admitted by all in the said Case of *Hamond*, where was such a Grant. And as this cannot be done by any direct Grant or Alienation, no more can it by an indirect or implied, as by taking of a new Lease, which is a Surrender in Law of the old Lease, no more than by an express Surrender; nor doubtless by Outlawry, whereby the Term of the first Devisee is settled in the Crown. But

Plowd. 320.
Welchden
and Elking-
ton. 10 Eliz.
Dy. 277.
19 Eliz. D.
359 Con. 8
El. D. 253.
or 33 H. 8.
Br. Chassels
23.

if we put the Case farther, of Wast committed by the Tenant for life, or breach of Condition by not payment of the Rent, or otherwise; these for the whole in the latter Case, and for the part wasted in the former, do so destroy the Lease, and put the Reversion *in statu quo prius*, as that all Remainders must needs fail: so of a Feoffment, or other like Forfeiture by Fine. As for the death of him in Remainder, it was urged in the Case of *Hamond*, that since it was but a meer Possibility, if it could not take effect, and become an Estate in the life of him to whom it was limited, it could not settle in his Executor: and to that purpose were cited the Case of the Rector of *Chedington*, and more expressly as resolved in the Point the Case of *Price* and *Atmore*. But the Court resolved, (and found former Resolutions in other Courts that way) that the death of him in Remainder did not hinder, but that it may settle as well in the Executors upon the death of the Devisee, as it should have done in himself, if he had over-lived the first Devisee for life. If the Lessor enter and levy a Fine, and the Devisee for life enters not, nor claims in 5 years; he in the Remainder

Welchden & Elk. *ubi supra*. But there the Point was never questioned, though such death was there.

der may enter, as having a Right futurally accrued.

In the last place we intermeddled only with Leases bequeathed, wherein yet is to be understood, that what thereof is spoken is to be extended to and understood of all other Chattels real, as Wardship of Body and Lands, Estates by Extent upon Statutes or Judgments, Terms otherwise than by Lease, in Fairs, Markets, Rents, Annuities, Commons, Advowsons, and other Profits; yea, one single next Avoidance of a Church. Now we come to consider of Bequests personal principally, if not only; *viz.* how such may be forfeited, lost, or revoked. First, then, we will consider of the acts of the Legatee; secondly, of the acts of God; thirdly, of the acts of the Testator. The Legatee, as from the Civilians I learn, may forfeit his Legacy by his miscarriage towards the Will: as if he use means to have it concealed and kept from being known, and consequently proved. So if he accuse it of Falsity. So, again, if he deface or destroy the Will. Also, if being by the Will appointed to be Tutor or Educator of a Child, he refuseth so to be. So saith Master Swinborn; but Sylvestre Prierius seems

Of Forfeiture, Revocation and other loss of Legacy.

Swinb. de testam. 352, 353. Except as Tutor or Guardian he accuse it.

Sum. Sylv.
283.

seems to me opposite in that where he saith, *Si legatum fuerit aliquid eâ conditione ut facias aliquid, tale legatum non est conditionale, sed modale*; so as he takes away the force of a Condition from words conditional, whereas the other without words conditional raiseth a Condition implied. Lastly, if the Legatee presume too far upon the strength of the Bequest to him, so as he taketh the thing bequeathed without the consent of the Executor, thus also doth he forfeit his Legacy, saith Master Swinborn, unless the Testator did will and appoint he should so do. The falling into enmity with the Testator will be considered of more fitly, as I take it, among the Acts of the Testator. In the next place, let us see what acts of God shall cause a Legacy not to take effect. First thus, If the Legatee die before the Testator, this Legacy is lost, and his Executor shall not have it. So also, saith Master Swinborn, if it be appointed to be paid after the death of the Executor, and the Legatee dieth before the Executor, it is lost. And so also if he die before the Condition performed, saith he. Let us come now to Time of payment, and Death

De Testam.
255.

before

before it. If there be a day certain limited for payment, and the Legatee die before that day, his Executor shall have the Legacy; contrariwise, if the payment were limited to be made when the Legatee should be married: but if it were only expressed to be towards the Marriage of the Legatee, and she die before Marriage, her Executor shall have it, saith *Swinborn*. Now put the case that a Legacy is bequeathed to B, to be paid when he shall be five and twenty years old, and B dieth before that age; it shall now be paid to the Executor, and that presently, without staying till B should have been of that age, saith *Priestius*. Nay, saith *Swinborn*, if the words of the Will be so, viz. when he shall come to such an age, then if he die before, his Executors shall not have it at all: but if the Bequest be general, and farther it is added in the Will, that the Testator would have that Legacy paid the Legatee at such an age, there, though he die before such an age, yet his Executors shall have the sum bequeathed. The difference may seem very nice, yet haply it wants not some probable colour of reason. Now lastly, let us come

Vide Bro. Devise 27. and 45.
There were divers days of payment, and the Devisee died before the last; his Executor shall have it. 14 vel 24 H. 8. 36 H. 8. 3 E. D. 59. See this difference.

Sum. Sylv.
283. According hereto, *vide Dy. ubi supra, per majorem opinionem Jusficiar.*

A&S of the Testator.

to

Sum. Sylv.
285.

to the Testator's own act, who clearly hath power to revoke or countermand any Legacy, though he revoke not the rest of the Will. And here first of Revocation presumed. If there fall out *graves inimicitie inter Legantem & Legatarium, Legatum caducum efficitur*, saith the Summist; *sed non propter leves*, saith he: *& si graves, si tamen redeant ad amicitiam, redintegratur Legatum*. That is, by grievous Enmity after arising, and never reconciled between the Testator and Legatee, the Legacy is dissolved; otherwise of a light breach or falling out, though it continue, until the death of the Testator. This I conceive to be rather fit for this place, as an act of the Testator, than to be reckoned or registred amongst the Acts or Forfeitures of the Legatee; for that it is not by the Summist made material, or any point of difference, whether the Legatee gave just cause of offence, or that the Testator unjustly conceived displeasure, and so grew into causeless enmity. Therefore also do I hold it of the nature of a Revocation implied or presumed; for that although no Revocation be made, yet since the Testator hath ceased to bear good will to the Legatee, he cannot be intended to will him good,

good, nor consequently to be of the same mind touching the benefitting of him, as he was when he made his Will. Yet here again it is worth the consideration, whether the circumstance following may not make a difference in the case; thus; That where the Testator dieth shortly after the breach and enmity grown, and before he come to the place where his Will is, or at least to opportunity of perusing and reforming the same, there this very alteration of affection should make an alteration in the Will, and a Revocation of the amicable Bequest. But where he living a good space after, and coming to the place where his Will was, and specially if he do again peruse it, he yet doth not cross nor expunge that Bequest, here it may be presumed that either his enmity ceased, or that so far as to continue this Bequest, the Charity or other motives inducing him to make it stood unvanishing and not extinguished by this breach of former Amity. For as the continuance of time and opportunity after the making of a verbal or nuncupative Will, without reducing it to writing, and causing it to be attested by Witnesses, though the Testator live divers years after,

after, doth strongly argue his intent not to continue, that what was done in an extremity should stand as his Will : so, on the contrary, the permitting of a Bequest expressed in a written Will to continue without any crossing, blotting or defacing, may argue, against contrary presumption, the Testator's mind, that it should continue as part of his Will. But now let us consider of more express Revocation, and to that purpose will I relate a late Decree in the *Chancery*, made by the Lord Keeper, according to the opinion of the Master of the Rolls, three Judges, and two Doctors, Masters of the Court, between *Robert Eyre* and *William Eyre* Complainants, and *Hester*, late Wife of *Christopher Eyre* their Brother, and now Wife of *Sir Francis Wortley*, Defendant : Thus was the Case. The said *Christopher Eyre*, 15 *Jacobi*, by his last Will and Testament giveth and bequeatheth to the said *Robert Eyre* his Brother an hundred pounds, and to the said *William* his Brother a thousand pounds, and gives to the said *Hester* his Wife all the residue of his Estate, and makes and ordains the said *Hester* his sole and only Executrix, saving, for the per-

performance of his Will, he orders *Robert Eyre* and *William Eyre*, his said Brothers, and intreats them to joyn as Executors in trust with his Wife, for the better performance of this his last Will. Afterwards, *Jan. 5. 1624.* being sick of the Sicknes, whereof he died, he was moved by Master *Damport* and Master *Stone* to settle his Estate : to which motion he yielded : and Master *Stone* and Master *Damport* did demand of the said *Christopher* what Friend he thought fittest to be his Executor, and to whom he would commit the care of discharging his Funerals, and performing his Will, whether he trusted any person more than his Wife to be his Executor. To whom he answered, That his Wife was the fittest person for that purpose, and therefore should be his sole Executrix. And then the Testator was moved by Master *Stone* to give and bequeath Legacies to his Father, to his Brethren, and to his Kindred : whereupon he answered, he would give or leave them nothing. And being farther put in mind to remember his Friends and others, gave and bequeathed to *Lionel Atwood*, his God-child, twenty or thirty shillings. And being there-

thereupon moved by his Wife to give his said God-son more, or a greater Legacy, or the like in effect, he said, Thou knowest not what thou doest, do not wrong thy self; twenty shillings or thirty shillings is money in a poor bodie's purse, or the like in effect: and the rest he left to his Wife's discretion or disposition. And the said Testator did speak the words aforesaid, or the like in effect, *Animo testandi & ultimam Voluntatem declarandi*; as the Witnesses then present did conceive.

This Will was proved by the Oath of the said Hester, and this Codicil being pleaded as a Revocation of the said Bequests, the said Master of the Rolls, Judges and Doctors, were by the Lord Keeper and the Order of the Court desired to reduce the matter upon the Will and Codicil into a Case, and to certify their opinions, whether the said Codicil were a Revocation of the Legacies given to the Plaintiffs, or not. And they, after Council heard at several times, viz. both common Lawyers and Civilians, and many hours spent in conference together, did finally resolve with one unanimous consent, that the Legacies to the Plaintiffs
given

Ord. 27. Jun.
2. 2 Caroli
Regis.

given were not by the said Codicil revoked, and so certified under their hands. Upon reading whereof *November 25*. Decree being resolved to be made, if cause were not shewen to the contrary *Novemb. 27*; on which day the Defendant's Council, before the Lord Keeper, in the presence of the Master of the Rolls and the said three Judges, and Sir *John Heyward*, alledging what they could in stay of the said Decree; it was by a general concurrence of opinion decreed, that the Legacies given to the said Plaintiffs should be to them payed on our *Lady-even*, with *twenty Nobles* in the hundred for the detainment thereof.

This Case I thought fit to relate somewhat at large, because it pitcheth upon the point of Revocation, without plain, full and exprefs terms. And surely, as Wills are to be made out of disposing Memories and Understandings, so also with deliberate and advised Judgments; and therefore by like reason not to be countermanded or revoked by sick or slight expressions. And this seems to me very agreeable with the rule and reason of the Common Law. For as Reason it self doth dictate, that *Nihil tam consentaneum est a-*

quitati naturali, quam unumquodque dissolvi eodem modo quo conficitur; so hath the Common Law of *England*, in my understanding, resolved: as for the purpose, If the King present a Clerk to a Church, and he is thereupon admitted, and instituted thereunto; now yet before Induction may this be revoked as a Will may: yet if the King shall after, and before Induction, present another man to this Church, without an expresse Repeal or Countermand of the former Presentation, it shall not hereby be revoked. So if Lands were conveyed to certain Uses, with a clause or power of Revocation; the Sale of the same to another did not revoke the former: but if a State were merely at will, then the Conveyance to another by the Common Law amounted to a Revocation. Therefore was the Statute made *tempore Henrici 8.* to redress this, *viz.* that where the King had granted Lands or other things to one during his pleasure, this should not be revoked by a Grant to another, without recital of the former, and Declaration that the King had determined his pleasure.

to help this
was the
Stat. made
27 *El.* cap. 4.

6 *H. 8.* cap. 9.

Being now to consider of Relation in
the

the Executor's Assent, it is meet, since these Discourses are principally intended for those who are not grounded Students in or Professors of the Law, that we shew what we mean by Relation, or what it is in Law. Thus therefore be it conceived, that Relation is a kind of fiction in Law, making a thing done at one time to be accepted and reputed, or to have its operation, as if it had been done at another time past. As for the purpose, *A* doth bargain, and sell Freehold Lands to *B* in *August* by Indenture, which is not inrolled till *October* following; yet this hath such relation to the Date of the Indenture, that if *A* after that, and before the Inrolment, become bound in a Statute, or granted a Rent-charge, or made a Lease for years, or took a Wife, or committed Felony, yet shall none of these be of any force to charge or prejudice the State of *B*, for that the Law adjudgeth him now owner by Relation as from the time of the Date: yea, if a Servant departing in *August*, for some great breach with his Master, do kill his Master in *October*, this is in-Law petty Treason, as if he had continued Servant when he did the fact; because

it relates to the malice conceived when he was his Servant. Now then having shewed that a Term or other Chattel real or personal passeth not, nor is transferred in property to the Devisee, until the Assent of the Executor be thereunto had; we now put the case that this Assent is not had till a year or some such good space after the Testator's death, and make our Question, whether this shall have Relation to the Testator's death, *viz.* to be in the Law's account as if it had then been; or, perhaps, to some purposes so to stand, and to others not so? That this is useful and material to be known, be it thus shewed. One bequeathed his term of Tithes of an Advowson of an House or Land by him first leased to an Under-tenant for Rent, and dieth in *May*, the Executor assenteth to the Bequest in *October*, between which two times Tithes be set out, the Church becometh void, Rent groweth payable; now if this Assent shall relate to the Testator's death, the Devisee shall have these, else not. The like Cases may be put of the brood of Cows, Mares and Ewes, fallen between the death of the Testator and the Assent; so also of Fleeces of Sheep shorn, &c.

Now

Now to come to the Point, it is reported by the Lord *Coke* to have been held in the late Queen's time, that this Assent shall, as between the Executor and the Legatee, have Relation to the Testator's death, yet so that if the Executor before his Assent to the Devisee of a Lease committed Waste, now the action of Waste shall be brought against the Executor in the *Tenuit* for the Waste done before, and not against the Devisee in the *Tenuit*.

Tr. 41 Eliz.
Co. l. 5. f. 12.
B. Sanders
Case. Vide
Plow. co. of
Trespass
against a
Stranger for
taking be-
fore Assents
280. b.

But put the case that the Legatee before the Executor's Assent granted the term to *J S*, now if to any purpose this Assent shall have Relation, it shall certainly so be to make good this Grant, as making the Legatee to be estated, and consequently able to grant before the Executor's Assent: yet do I not find any opinion or resolution in the Point, but find it debated at the Bar in the late Queen's time between *Puckering* and *Egerton*, in the Case of Administration granted to *A*, after her Grant of a free Term left by her Intestate Husband; but I find no Resolution therein, nor perhaps wants their material difference betwixt that Case and the other;

P. 25 Eliz.

48 E.3.15.

for there the Devisee had at least an inception of Title by gift of the Owner, wanting only a circumstance of Assent to perfect it ; but here this Woman till Administration had not so, unless, perhaps, the Statute 21. of King *Henry* the 8th, directing or enjoining Ordinaries to grant Administration, shall amount to a kind of Title *ad rem*, though not yet *in re*. But to return to the Point of *Assets* ; Where a Reversion is granted by Deed or Fine, if the Lessee a good time after do attorn, this shall have no Relation to the time of the Grant ; so as for Waste committed or Rent grown due between the Grant and Attornment, the Grantee can have no remedy. Therefore it is good for him who buyeth, or hath any thing of the Gift of a Legatee, to have the Assent of the Executor before the Sale or Gift well testified ; or if the Assent be not had till after, let him take a new Gift, that he may not rest in a doubtful case : for besides the Premises, that great Legist Sir *Edward Coke*, when he was a practiser (to Mr. *Stubbs* of *Norfolk*) for his Fee, gave his Opinion, as I have been confidently informed, that where a Lessee for years being outlawed did grant his Term, and after reversed the
the

the Outlawry, this did not make good the Grant by Relation, it not being in the Grantor at the time of his Grant. And this hath much affinity with the principal Point; for there, if the Relation help not, the Grant is not good from the Legatee.

Divers Cases of Bequests considered and expounded.

IF a Termer of an House bequeath his House to B, without expressing how long he should have it, he shall have the whole Term and number of years. So of Land.

14 Eliz. Dy.
307. Cont.
in a Grant,
31 Eliz.

Also of the name of the House, the Orchards, Gardens and Backsides do pass: yea, if the House with the Appurtenances be bequeathed, thereby the Lands belonging to the House, or used with it, do pass, though yet they would not so do by such words in any Lease, Deed, or Grant. Yet by some Civilians, or Canonists, the Orchard belonging to an House shall not pass by the only Gift of the House, without some words shewing the intent of the Testator so to

Sum. Sylv.
286.

be, or except one Gate or Door lead as well to the Orchard as to the House : but some other of them hold, that it doth pass without any such help of circumstance, so as it be adjoyning to the House.

If a Lessee for years give his Term by his Will to A, he shall have it without paying any Rent, for the Executors shall pay it for him, as I find in the Summist ; but against Reason, methinks.

Ibid. ut sup.

If one bequeath his Indenture of Lease, his whole state in that Lease passeth. So if one bequeath his Obligation or other Specialty, the Debt or Duty it self shall go to the Legatee ; and by the Canon or Civil Law the very Action it self passeth,

Ibid. ut sup.

viz. as I conceive, ability to sue the Debtor in his own name : but in our Law it is otherwise, the Suit must be in the Executor's name, for a Debt or thing in Action cannot be assigned, except by or to the King ; and only at the Common Law is the Debt recoverable ; but the Spiritual Court may force the Executor to sue, or let his name be used in the Suit, for and by the Legatee.

Yet 48 E. 3. 42, 13. it is admitted, that such a Devisee of all Goods, after Debts payed, shall have a Duty resting in account.

If one bequeath all his Moveables, Debts due to him are not bequeathed, nor Corn, nor Fruit growing on the ground,

ground, nor Stone, nor Timber prepared for Building, as the Canonists and Civilians hold.

On the other side, if one bequeath the moyety of all his Goods, the Legatee shall have only the moyety of that which remains after Debts payed; for that only is to be accounted the Testator's which he hath *ultra es alienum*.

By a Bequest of all Utensils or Household-stuff, Plate nor Jewels are not given.

2u. 36H. 2.

Dy. 59. Dy.

ibid. supra,

Sum. Sylv.

286.

If one bequeath to his Wife all her Apparel, she shall not have, as some Civilians say, her Ornaments of Gold or Silver; by which is meant, as I take it, Chains, Jewels, Bracelets, Rings, &c. But others are of contrary opinion, except they be such things as are not lawful for her to wear.

If a Bed be given by a Will, *Venit ornamentum ejus*, saith the Civilian, that is, the Furniture thereof passeth, *viz.* not only the Bed, Bed-stead, Bed-cloths, but also the Curtains and Vallans, as I take it. But I think that by gift of a Coach by Will, the Coach-horses pass not; yet perhaps the Furniture of the Coach-horses may pass as appurtenant to the Coach; for so I think they shall do, rather than by Bequest of the Coach-horses without the Coach.

Ibid.

Ibid.

If one bequeath to *A* Meat, Drink and Cloathing, or *Alimenta*; he shall have, saith the Civil Law, also Lodging, Habitation, and all things necessary for the maintenance of life, *viz.* as I take it, Fire and Washing, &c.

Ibid.b.

If one bequeath to his Daughter ten pounds a year for her Apparelling, and she demandeth none in four years; now shall she not after that time have the Arrerages of this ten pounds by year for the time passed.

Ibid.

If a man bequeath one of his Horses or Cows, not naming which, to *J S*, he is to chuse which he will, so it be not the best of all, saith the Civil Law: and perhaps the mention of that exception grows out of respect to the Herriot, which the Lord should have, or the Mortuary, which the Parson should have.

Ibid.

A man bequeathed thirty pieces of twenty shillings to *A*, twenty to *B*, and ten to *C*, to be had in such a Chest or Casket, and it is found after his death that there be but thirty in all in that Casket or Box; now each shall be abated ratably, saith my Summist, so as *A* shall have fifteen, *B* ten, and *C* five; and this stands with good Reason and Justice; for
so

so each hath a proportionable part. And it were reasonable that it were by Parliament established for Law, that all, both Legatees and Creditors, should be payed in like proportion, where the State will not suffice for full payment of each, rather than that an Executor should have power to pay one all, and another nothing: yet if the Testator left sufficient to make good all those sixty pieces bequeathed, *Quere*, if that which is wanting in the Casket shall not be supplied and made up; for if the Cases following found with the same Author be good Law, it should seem so to be.

If one, saith he, bequeath to *J S* that which is another man's, and whereto the Testator hath no right; then ought his Executor to buy it, and give it to the Legatee, or else satisfy him to the full value; and this, not only by the Civil, but also by the Canon Law, and *in foro Conscientie*, saith my Author. *Sum. Sylu.*
286.

Again, If *A* bequeath to *B* such an Horse by name, and after sell away that Horse, and dieth; now is his Executor bound to answer the value thereof to *B*; and if the Testator, after his sale of that Horse, had bought another, and called him *Ibid.* 287.

him by the same name as the first ; now shall this later Horfe pass to B, saith the Book, except it can be proved that the Testator sold the former Horfe of purpose to revoke his Will touching that Bequest.

Ibid. 286.

So again I find, that if one having but a moyety or one half of green Close, or of a Stack of Corn, or other Chattel, doth give the whole, so as the words be apparent to reach to more than his moyety, then must the Executors buy out the other's part for the Legatee, or give him the value: but if the words be but general, so as they may be reasonably satisfied with the Testator's part, no supply shall be made. So also if one, having Goods in pledge, bequeath them, it shall be construed to extend no farther than his right.

Ibid. 284.2.

A Bequest is made of an hundred pound to be payed at a future time, viz. divers years after the Testator's death; a Question is made by the Summist, whether the profit of the money in the mean time shall go to the Legatee, or the Executor : and he resolves with this difference, if the day were given in favour of the Legatee being an Infant, who could not safely receive it any sooner, then he shall have the profit ; but if the respite of payment were

were in favour of the Executor, then shall the Legatee have but the bare sum, without any addition of mean profits.

If one bequeath all his Term or Goods to his Executor for payment of his Debts, or Debts and Legacies, it is a void Bequest; because it is no more than the Law would say, if he had said nothing. So if it be generally to perform his Will.

15 Eliz. Dy.

331.

Plow. Com.

545. b.

Co. lib. 8.

96. a.

If one, seized in Fee-simple of Land, bequeath it to his Executor to pay Debts, the Executor hath no state of Free-hold: for if he should, then it must be either for life, which might end by his quick death before Debts payed; or in Fee-simple, which would carry away the Land for ever from the Heir, where perhaps a few years profits might suffice to satisfy the Debts; yea then by death of the Executor the Land should descend to his Heir, and not go to his Executor, who would be Executor of the first Testator.

If one give or grant all his Goods, having Leases for years as well as Moveables, the Leases shall not pass, as was held in the time of K. Edward the sixth. And so also was it admitted in *Portman's Case*. For the word *Bona* comprehendeth only Moveables, by the better opinion there.

By deed or word in life.

4 E. 6. Bro.

Done, &c.

41. Tr. 37.

El. in ba.

reg. Portman

ver. Simmes,

or Willis,

divers times

argued.

But

But the Point in that case was pertinent to this place, *viz.* a Bequest in a Will of all the Testator's Goods: and whether thereby a Lease for years passeth or not, was divers times debated, but not resolved, the Judges differing in Opinion in that Point; but in another Point, which made an end of the Case, all agreed. Yet the better Opinion was, as I find in my Report, that a Lease would pass by such words in a Will, though not in a Deed or Grant by word otherwise made; for the Legacies are demandable in the Spiritual Court, where *Bona & Catalla* are taken for all one. See also the Statute of *Marlbr.* giving an Action to the Successor, *Ad repetenda bona pradeceff.* Yet an *Eject. custod.* hath been maintained thereupon. So also upon the Statute of Executors, *De bonis asportatis in. vita Testatoris*, hath it been resolved, and where Administration is granted, it is only *omnium Bonorum*, without speaking of Chattels; yet hath the Administrator interest in Leases as well as Moveables. On the other side, the Statute *de Prerog. reg.* mentioning only Forfeiture *de Catallis*, is clearly extended to Moveables: so also in the Writ of Affize *De catallis quæ in eo capta fuerint*, and in the Writ of

Cap. 28.

4 E. 3. c. 7.
So the Stat.
5 R. 2. of
Forfeiture
of goods by
those who
go beyond
the Sea, cap.
16. In all
these Goods
are compre-
hended,

of Execution upon a Statute there is only the word *Catalla*, and not *Bona* : and in the Case reported by *Kelway*, temp. Henry the 7th, it seems *Bona & Catalla* were taken for *Synonyma*, or all one. It doth not appear that these Statutes and Writs were alledged or considered of, temp. Edw. 6. but in *Portman's* Case the most of them were.

13 H. 7.
Kelw. rep.
35. a.

If one will that his Wife, or any other, shall have, or hold, or enjoy the moyety of his Lease with his Executor, this implieth not that the Executor have the other moyety as a Legacy also, but otherwise as the Law casts it upon him ; no more than where the moyety of Fee-simple Land is devised to the younger Son, this shall not make the elder Son to have the other moyety otherwise than by descent, as between *Low* and *Carter* was conceived. But there being a Proviso in the Wife's Bequest, that if she married from the House, then, &c. *Low & Carter's* Case, Tr. 37 El. in *ba. reg.* *Popham*, Ch. Justice, held, that if she married at all, this was a marrying from the House ; for she was no longer Widow of that House, though she married with one of that Kindred, and who had no other House, but would dwell in the bequeathed.

CHAP. XX.

Of the Executor of an Executor.

See *Plow.*
184. a Debt
against the
Executor of
an Executor.

19 *Ed. 2.* &
14 *Ed. 3.*
Fitz. Execu-
tor 87, &
203.

I Should be taxed of omission, if I should not shew whether the things forespoken of Executors immediate extend also to the mediate or more remote Executors. Assuredly, were I not by the Books otherwise informed, I should think it somewhat strange that the mediate Executor in the fourth, fifth or farther degree, should not by the Rules of the Common Law stand in like plight Executor to the first Testator, as the first and immediate Executor; as well as the Heir and Assignee in the third or thirteenth degree is capable of all advantages in like sort as the first and immediate Heir and Assignee. And indeed, we find both in the time of *Edward* the second and *Edward* the third Execution sued out upon a Judgment and Statute by an Executor of an Executor; and why he might not as well maintain an Action of Debt, &c. I see not. But
I must

I must confess, I find both Books to the contrary before any Statute made in the point, and after an Act of Parliament to enable them to bring Actions, and to make them subject to Actions; yet the Statute speaks nothing of conferring upon them the Testator's Goods. Now if they had title to them before that Statute, and without the help of that Statute, it is strange if they should not be suable for Debts. But since that Statute, and at this day, where by a Will a special Trust is recommended to an Executor, as to sell Land, &c. this not performed in his lifetime shall not be performable by his Executor: contrariwise of an Interest, as to take the Profits of Lands for certain years towards payment of Debts and Legacies. And where the Statute *temp. H. 8.* gives remedy to Executors for recovery of Rents of Inheritance behind in the Testator's life, I doubt not but Executors of Executors are within the equity, as well as within the Statute *9 Ed. 3. cap. 3.* that the Executor who appears at the grand Discreits shall answer alone. Yet the Statute *Westm. 2. cap. 23.* for Executors, was taken not to extend to Executors of Executors. *Quod non est lex.* So as now in all cases,

*ii Ed. 3. 6.
23 Ed. 3.
Stat. Mar.
78.
23 Ed. 3. 43.*

*19 H. 8. 9. 10.
4 Ed. Dy. 201.
32 H. 8. cap.
27. So 32 H.
8. 28 Leases.
And 32 H. 8.
cap. 33. Con-
ditions. And
13 Ed. cap. 3.
6. 27 Ed. cap.
4. of fraudu-
lent Convey-
ances.
21 H. 8. cap.
25. for falsi-
fying Reco-
veries.
39 H. 6. 43.
7 E. 3. 62.*

except of special trust or authority without the office of Executorthip, the Executor of an Executor, how far soever in degree remote, stands as to the points both of Being Having and Doing, in the same state and plight as the first and immediate Executor.

CHAP. XXI.

Touching Administrators.

In these also, as standing in much affinity with Executors it may be by some expected that I should have treated. But first, my excuse is, that these of Executors only having grown to so great a bulk above expectation, I was unwilling to enlarge it further.

Secondly, that which in the points of Having and Doing is before set forth and shewed touching Executors, may be applied to and understood of Administrators, though not what is spoken of Being and Unbeing, or Revocation of Executorthips, and other circumstantial points.

Lastly, I may, perhaps, if these find good acceptance, add ere long that which

appertaineth to Administrators distinguished from Executors, or wherein they stand in different state.

CHAP. XXII.

Considerations in Conscience touching payment of Debts, Legacies, and the preferring or respect of persons.

TO the Advertisement, what course Executors are to hold in their payments, I thought good to add this *in foro Conscientie*; That when as it shall stand in the Executor's Will and Election to pay whom he will and as he will, in respect of equality in the dignity and degree of the Debts, all being for the purpose by the Specialty, and none of Record, and yet he hath not wherewith to pay or satisfie all; here he may have three ways or courses in his eye.

First, where there is equality in the honesty and Conscience of the Debts, there (except in the ability of the parties to bear loss, the disproportion may otherwise occasion,) methinks it should be most honest and just to pay every one proportionably,

1.

nably, and to let the loss of every one to be equal: And the justness of this is taught by the Law, which gives the *Audita querela* for equal contribution in bearing of loss by them who stand in equal degree: so of Legacies.

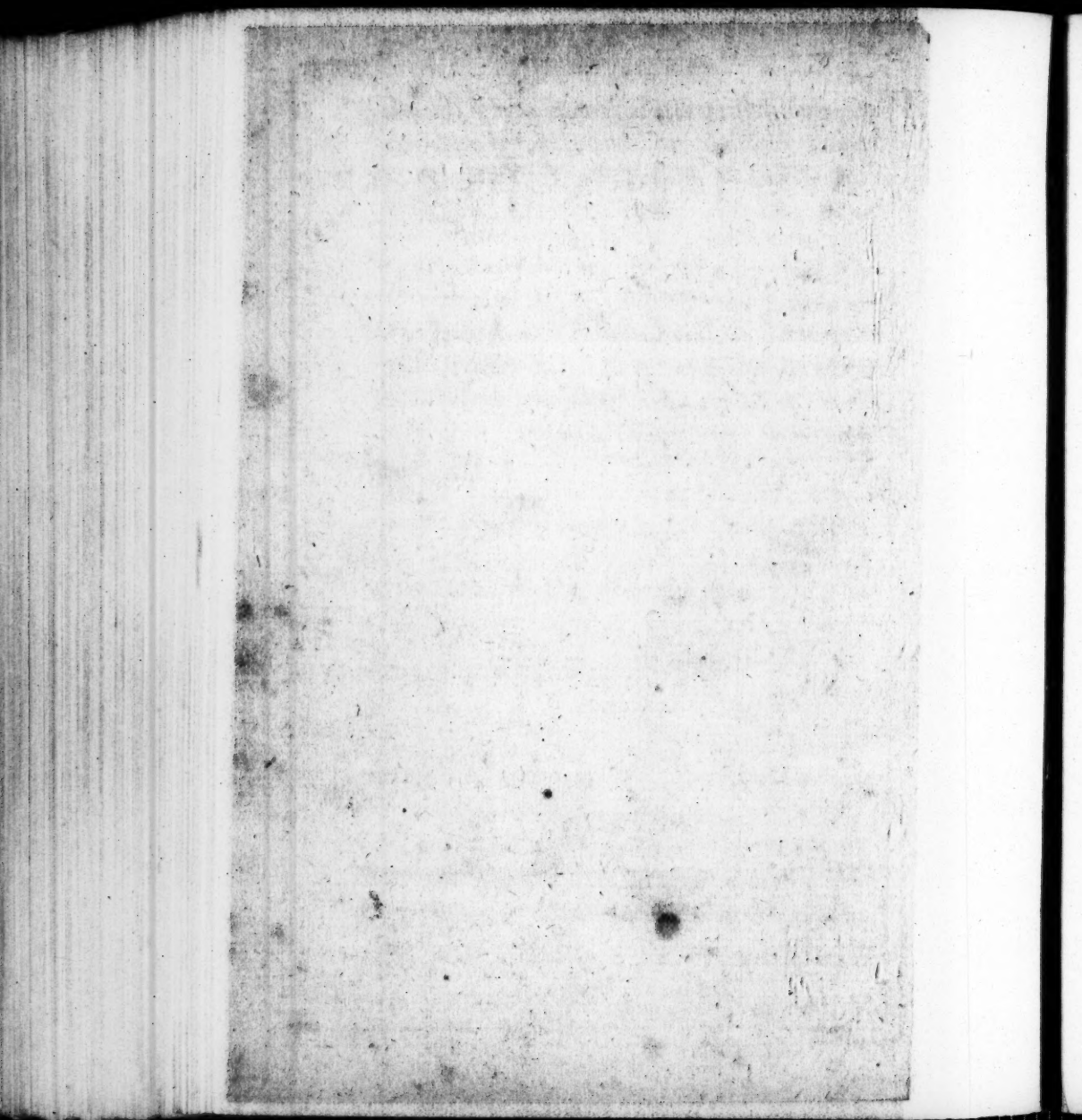
2. The poverty and inability of some, and the plenty of others, may in *fora Conscientie* justify the paying more to one, and suffering him to lose less, (if any thing) than another. For if the Widow's mite was a greater gift, so a greater loss than more out of abundance. Where Charity finds or may find place or nearness to place of giving, it may find greater motives of preserving from loss: so of Legacies.

3. The nature of the Debts, and so sometimes of Legacies, may be so different, as thence may spring a just motive to disproportion payments, to pay more to one than another, rate for rate; and so to suffer one to lose more than another. One Debt may perhaps be use for money, or at least money lent for Use; another may be money freely lent; another Debt for Land of Inheritance bought; another Debt for a Lease, Chattels or Moveables, come to the Executor. The first merits the least respect, next the second, then the third, and

and the last the most. But where without any of these motives there is not equality held in the payment, *peccatur* (as I think) *in Conscientiam*. But let every one stand or fall by or to his own, or to him who is greater than his Conscience. This equality Saint Paul in another case recommends to the *Corinthians*. And Solomon, whilst no inequality appeared in the point of right, shewed his disposition to have made an equal division of the Child between the Mothers, who were joynt Claimers and Competitors for it.

See more of Conscience, *Doct.* and *Stud.*

FINIS.



R with the preceding

AN
APPENDIX
TO THE
OFFICE and DUTY
OF AN
EXECUTOR:
WHEREIN

Are contained the Natures of Testaments, Executors, Legataries general, and divers other Material things relating to the same; Briefly Methodized for the Use of all Persons concerned.

By *THOMAS MANLET* of the
Middle Temple Esquire.

L O N D O N,
Printed for *Henry Twyford* in *Vine Court*,
Middle Temple, 1676.

AN
APPENDIX
TO THE
OFFICE AND DUTY
OF AN
EXECUTOR

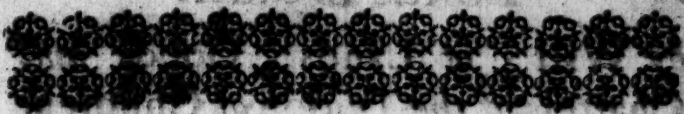
THEIR

are contained the Names of Testa-
ments, Executors, Legacies general, and
divers other particular things relating to the
same, being Methodized for the Use of
all Persons concerned.

By THOMAS M. A. & F. of the
Middle Temple, Esq.

LONDON

Printed for Henry Taylor in New Street
near St. Dunstons Church, 1714.



TO THE
READER.

THis little Essay which is here added by way of Appendix to the Office and Duty of an Executor, contains in it many things which have not yet been Common, either for Method or Use: For first you have the things defined, and then the Use of them, with apt Cases in Law thereunto applied: It also shews what a Testament is, who are capable to make one, and what things may pass thereby; what things may pass

To the Reader.

by Will ; of Lands , Goods and Chattels; of the Tuition of Children, to whom ; the Forms of Testaments ; what Persons may be capable of Executorship, or Legacies ; the kinds of Executors ; whether better to accept or refuse Executorship ; of Mortuaries, of Accounts, how Testaments become void , Ademption of Legacies, &c. wherein also are introduced some Observations on the New Law of Administrations, and distribution of Residuum by the Statute made the 22. year of His Majestie's Reign, by all which if thou receivest benefit is the end desired by

T. M.

THE

AN
APPENDIX
TO THE
OFFICE and DUTY
OF AN
EXECUTOR.



Testament differs from a Testament;
last Will in the naming
an Executor, and it is
thus defined: *Testamen-*
tum est voluntatis nostrae
iuxta sententia de eo quod
quis post mortem suam fieri voluit.

If one demand of B who shall be his
Executor, and he name D; or if B say,
I mean to make D my Executor, yet D is
not Executor, unless it be probable that

An Appendix to

B had at that time *animum testandi*.

A is compelled by fear or menace, or urged by violence to make his Will, this is void, yet a modest request to one to make his Will, is allowable.

If any person refer his Will to another to declare and name an Executor for him, and he do it, this is void.

Codicil.

A Codicil, is like a Boat tied to a great Ship: there is no Executor named therein, it may be written or nuncupative; made before or after the Testament, or by one dying intestate, and perhaps long before his death, and yet it may be good; for being made before a Testament, it will be good, unless it be revoked by a Testament, or be contrary to it.

If two Testaments be found, and no knowledge which was made first, and they differ both in matter and circumstance; both shall be void; not so of a Codicil unless the one impugn the other.

Legacy.

Things given and delivered by a Testator in his life time, are no Legacies.

A named B his Executor, who cannot or will not intermeddle; Administration must be granted by *Statute cum testamento annexo*, which makes the Legacies thereby given due both by Law and the

the custom of *England*. But the civil Law holds the contrary to this.

A bequeaths Corn growing or Goods unto one: A Stranger will not suffer the Executor to perform the Will, he shall sue him in the Spiritual Court. *Contra* if a Stranger take the Testator's Goods from the Executor, there he may have an Action of Trespass at the Common Law.

A Testament dated at *Cane* in *Normandy*, and proved afterwards in *England* is good. Legacies are to be recovered in Court Christian, so if a Termor devise his Crop or Goods: But of Franktenement or Inheritance, the Legatee may enter without further Assignment.

A bequeaths Goods to repair the Fabrick of a Church, if they be detained they must be recovered in the Ecclesiastical Court, so must a Wardship and Chattels real when bequeathed, be recovered.

A charges his Executor to pay his Debts, the Creditor in respect of this charge may sue in the Ecclesiastical Court. So if an Executor be charged to build a Grammar School, and he neglect it.

Among the Ancient *Roma* is there was

A
Solemn Te-
stament.

An Appendix to

a Will, called a *Solemn Testament*, which was proved by seven Witnesses, and all their Seals affixed to it, or else it was deemed void; but now two sufficient and credible Witnesses suffice.

In a Devise of Lands it must be in the life time of the Testator and in writing. But of Land devisable before the Statute, the Testament is good if it be probable.

One dying intestate, the Widow or next of Kin shall have Administration. See the *Stat. 21 H. 8. 5.* but see also *31 E. 3. 11.* but these are both altered by the late Statute made in his now Majestie's Reign.

Testaments written by others being read and allowed before the Testator are good, or if a Notary take brief Notes and write them in form at large, and the Testator die before he hear it read, yet it is good to pass Lands and Tenements.

Lands will not pass by a Nuncupative Will by the *Stat. 32 H. 8.* yet in Burgage tenure it may be the contrary.

A Testator writeth his Will with his own hand, or causeth it to be written in his presence, and after shews it to witnesses, and then sealing it up, says, This
is

the Office of an Executor.

is my last Will; this will be a good Testament; but it is necessary such witnesses write their names on the backside.

A Testator says such a one naming B, hath his Will in keeping, and after dies, B produceth a Will and is sworn to it, yet he must prove it at least *communis formâ*, or if put to it *per testes*, who can prove the hand and other circumstances.

Testaments
Priviledged.

Besides them there are Military or Priviledged Testaments, and those of three sorts. 1. Among Souldiers, they may have two and both good according to meaning, these Souldiers were anciently divided into three Kinds: 1. *Milites armati*, 2. *Milites Literarii*, 3. *Milites caelestes*, that the *Milites armati*, the active Souldiers had this priviledge is not to be doubted: but the 2. *Milites literarii* who were Doctors of the Law, and the 3. *Milites caelestes*, who were Divines were but metaphorical Souldiers, and it hath been a continued doubt whether they ought to have this Priviledge.

The second sort of Priviledged Testaments is called *Testamentum in Liberos*, and in such case where two Testaments are found, and the first is to the use of Children, this will not easily be avoided

by a latter Will giving Goods to strangers, unless in the latter there be a special revocation, or else it be made *in pios usus*, or upon some great disagreement, that had of late happened between the Father and Children. But if two be found of one date, and the one favours Children, and the other hath a contrary face or design, that that favours the Children, shall have the more favourable allowance, because it carries the Estate to the blood, which the Law is very tender of.

The third sort of Priviledged Wills is *Ad Pios causas*, whereby a Legacy being given to young Orphans, Widows, lame, diseased, poor, needy and miserable persons, or to Hospitals, Churches, repairing Bridges, City-walls, &c. These priviledged Testaments may be written with any Characters, Figures, Language, &c.

A Testament *ad pios usus* found cancelled, unless there be a positive proof of cancelling the same, shall be presumed to be done unadvisedly, and so consequently good.

Two Testaments are found: 1. *Inter Liberos*, 2. *Ad pios usus*, both of one date,

the Office of an Executor.

date, of these the first shall be judged good, because the Children have a first right, & *jure successionis* shall be admitted.

C H A P. II.

What Persons may make a Testament.

NOne under twenty one years of Age Child's age. may devise Lands, Tenements, or other Hereditaments: But of Goods a Boy at fourteen, and a Girl at twelve may dispose, but not before; though *ad pios usus*: nay in truth it is voidable being so made in Minority, unless (if when they come to full Age) it be confirmed, for then it will be good.

Mad and Lunatick persons cannot dispose of any thing during their Madness and Lunacy, though *ad pios usus*: but if they have *lucida intervalla*, it is held otherwise. Mad and Lunatick

A being *compos mentis*, makes his Will, after he becomes *non compos*, and during that incapacity would disannul it, this will not avoid it, for the first Will stands good. And here note, that every man and

An Appendix to

and Woman is supposed to be of sound and perfect mind and memory unless positive proof be made to the contrary. Words only are not a sufficient proof of sanity of mind or to set forth the reasonable faculty. For a Parrot may be taught significant words, yet none will aver them to proceed from an instinct of reason, no more than they can assert *Balaams* Ass a reasonable creature, because by miracle it's mouth was opened to reason with it's Master.

Old Men.

An old Man, who is so superannuated that he has forgot his own name, is held unfit to make a Will. So a Man *in extremis*,

Villains.

The old Law of Slaves and Villains, was this; their Lands, Goods and Children gotten by themselves, or given them by others, were all in bondage. For whatever such a bondslave getteth, it is his Lords; for if a Villain make a Will of his Lands, or Tenements, or Goods, and the Lord enter before the Will proved, the Will shall be void, and the Lord shall have them. But this Law is (though not abrogated) yet so long disused, that it is of no force.

Prisoners.

If a Man be condemned to perpetual imprisonment

the Office of an Executor.

imprisonment upon a criminal account he cannot make a Will; But a Prisoner for Debt may, so it be not to defraud his Creditors.

A Woman Covert cannot devise Feme Co.
vert.
Lands, Tenements, or Hereditaments,

neither to her Husband or any other;

1. Not to her Husband for these reasons.

1. For that may be in prejudice of the Heir. 2. Albeit she did of free will, and without constraint, for the tie is not apparently taken off. 3. Although the Will were made before Marriage, for

the Testator must be in as good power at the time of death as of the making the Will. 4. If the Wife make a Will

during Coverture, and then survive her Husband, this is supposed void, unless she confirm it after the Husbonds death; But if such Will were made before Marriage by her, and she survive, that will be good.

She may not devise Goods and Chattels without consent of her Husband, but by his licence peradventure she may.

In some few cases a Feme Covert may make a Will without her Husbonds licence, as first an Empress or Queen, so

it

An Appendix to

it be not in prejudice of her Husband or his Regality. 2. When any thing is due to the Wife whereof she was never possessed during the coverture; neither may the Husband bequeath a chose in action, as an Obligation, &c. which he hath only in the right of his Wife, if he be not joyned with her, or the property altered after Marriage. 3. A Woman betrothed to a Man, may before espousals make a Will. 4. If a Wife be Executrix to another, she may dispose of those goods, else might the next of Kin have administration *de bonis non administratis* of her Testator, for where an Executor dyes intestate, the Testator from that time is deemed to dye intestate.

A Wife may appoint her Husband her Executor, but such Wife is restrained from making such a Will two ways, 1. Unless she appoint an Executor, her Will will be void. 2. If such Wife have any Goods as Legatary from the Testator, and which she receiveth as Legatary, not as Executor, they are her Husbands, and so not by her devisable: also increase of goods during the coverture which the Wife has as Executrix, as Calves, Lambs, and the like, the same redound to the Husband and not to her.

A

the Office of an Executor.

11

A Wife or other Executor and Legatary is deemed to accept Goods as Legatary, not as Executor, unless by Protestation or some other means, the contrary appear, for it is her better Title and more free; yet this is according to the rule of the civil Law, but not agreeable to the Law of the Land.

If a Husband be bound, or do voluntarily licence the Wife to make her Will before Marriage, and she make two or three, the last is that must stand.

A deaf and dumb person, not knowing what a Testament is, cannot make a Testament, but if he were not deaf, *a partu & naturaliter*, but he became afterwards deaf and dumb by accident, or otherwise, he may do it by signs, but it will be better if he can write. He that can speak could once hear, *Ergo*, he may make a will.

Deaf and Dumb.

Dumb and not deaf, may make a will by signs, so as the same be well known to witnesses.

A blind Man, may make a Nuncupative Will, or a Testament in writing, if it be read to him, and he declare he heard and understood it.

Blind.

A person convicted of High Treason, cannot

Traitor.

cannot make a Will, for that he hath forfeited all his Estate both real and personal whatsoever. But if he obtain a Pardon, *Quere*, what he may do.

Felons.

Felons forfeit their lives, Goods and Chattels, and the profit of their Lands for a Year, Day and Waste: and after the King hath had *annum, diem & vastum*, the chief Lord of the Fee shall have it, except in the County of *Gloucester*, where the next Heir after the Year and Day shall inherit; and in Gavel-kind Lands where they descend equally to Sons, and for default of Sons to Daughters in like manner: And there it is said, *The Father to the Borough, The Son to the Plough*. So that Felons cannot make Testaments of what the Law hath made a *prior* disposition. But if a Man be indicted of Felony, and dye before conviction, he may devise his Goods and Lands, or if upon his arraignment he stand mute, his Goods shall be confiscate, but he may devise his Lands.

For a Felon attainted at the time of the Fact committed, in such case it is to be regarded in respect of his Lands: But for his Goods, the time of Judgment must be respected; for before Judge-

Judgement he may give his Goods, for neither the Sheriff nor other person can seize before conviction.

A Heretick doth not forfeit his Lands unless he be executed, nor Goods unless he be convicted and delivered over to Lay-mens hands, yet if he be but excommunicate, he cannot make a Will. Heretick.

Apostates are of three sorts. 1. Such who having once been Christians renegue their profession, and become *Jews* or *Turks*; and such an Apostate was *Julian* the Emperour, who from thence had the infamous Sirname of, *The Apostate*: Apostate.
2. Such as being subject, refuse to obey the command of the Ordinary or Superior, as our now *Seciaries* and *Nonconformists*. 3. Such as have entred into Holy Orders, and afterwards throw it off, and become lay in habit or profession, and these are all reputed as bad, if not worse than Hereticks.

A Sodomite, *qui peccatum inter masculos & contra naturam cum femina*, is barred to make a Will, although he be not convicted. Sodomite.

An Outlawed person is out of the protection of the Law, and all his Goods and Chattels are forfeited, be the cause of Outlaw.
Action

Action just or unjust, *Doll. and Stud. Lib.*
 1. Cap. 6. in fine, if one be outlawed for
 Felony he shall forfeit Goods and Lands,
 but in Action personal the contrary, if
 any Errour or discontinuance be in the
 suit or Process whereby the Outlawry
 becomes reverfable, as where the party is
 beyond the Seas; where three proclama-
 tions are not made, whereof one in open
 Court, another at Quarter-Sessions, and
 a third at the Church or Chappel-door
 where the Defendent dwelleth; or
 lastly, where the party hath obtained
 his pardon.

In extreams.

One at the very point of death, if he
 be of good memory, though you can
 scarce understand what he speaks, yet
 may make his Will, and it shall be good.

A written Will is brought to a sick
 Man, and he is asked if that be his Will,
 and he answers yea; this Will if it were
 written by the sick Mans privity, or di-
 rections it will be good; otherwise it is
 held contrary.

Religious.

Ecclesiastical persons are either Regular
 or Secular; The Regular are Monks,
 Friars, &c. And if such a Regular Clerk
 make his will at his entrance into Religi-
 on, it must be then also proved, and the

Exe-

Executor must enter as if he were actually dead; for he is accounted dead in Law in respect of his Vow, and therefore totally disabled to make a will afterwards. The Secular are Bishops, Vicars, &c. and these may make a will, so as the Goods they dispose thereby be not held by them in right of their Church: for they may not devise the Fruit of Trees growing on the glebe. Howbeit Corn growing upon the glebe belongs to him, his Executor or Administrator, but of other Fruits, Tythes, Oblations and Emoluments, the next Incumbent shall have them towards payment of his first-fruits: and if he dye his Executor, 28 H. 8. 11.

B

CHAP.

CHAP. III.

What things may pass by Will, and how much. 1. Of Lands. 2. Of Goods, and Chattels: And of the tuition of Children, to whom, and how it shall be granted or committed.

Lands are devisable, either by Custom, or by Statute. By Custom, such are Gavel-kind Lands, (which are not confined only to Kent, as hath been erroneously held from the Grant of *William the Conquerour*) And one seized thereof may give or sell them at his own pleasure: neither are they forfeitable for Felony, according to the Adage, *The Father to the Bough, The Son to the Plough.*
 2. Lands held in Burgage-tenure by Custom devisable in divers Cities and Burroughs. And such Land may be given in Fee-simple, Fee-tail, for Life, or Years, so as the Will be enrolled before the Mayor, neither is it needful to have it written according to the form of the Statute of *Hen. 8.* for that the Land was devisable

devisable before that Statute, and is a kind of a Socage-tenure.

Citizens, Burgesses and Free-men may devise their Lands in Mortmain, which others who have Burgage Lands may not do, otherwise there is no difference. But joyntenant of Burgage-Lands cannot devise his part, for it will pass by survivorship.

The Custom of devising Lands to Feoffees reformed by 27 H. 8. which see at large. As also the Stat. 32 H. 8. whereby Lands may be devised.

A. having Lands in Socage may devise all except he have Lands of the King or others in Knight-service, but in such devise there must be reserved *primer seisin*, and fines for alienations, such as should have been, in case the Land had been altered or sold.

If one hold Lands in Socage, and other Lands in Knight-service, he may devise all his Socage Lands, and two parts of those in Knight-service, reserving three parts for the King or other Lords of the Knight-service Lands for Wardship and *primer seisin*, &c. but this is in effect now out of doors.

If there be two joyntenants or more of

Land holden of the King, and one die, his Heir shall be in Wardship.

Lands, Tenements, Rents and other Hereditaments in possession, reversion or remainder may be devised as before.

Of Goods and Chattels all may be devised, yea as well things extant as things not in being at the time of the devise, or during the Testator's Life, as Corn annually growing in such Lands, all Lambs coming of such a flock, depasturing in such a Field next Year; but if no such Corn or Lambs be; it is void.

By common Law; If *A.* grant *B.* an annuity of 10*l.* to be taken out of his Coffers, and he have no Coffer, or out of his Lands in Dale, and he have none there: in both these cases his person is chargeable.

By a deed of Gift made of all Goods, and Chattels, yet debts or things in action pass not: Contrary it is of a devise by a Will; for if a debt, or thing in action be given to *A.* the Testator may make him Executor only to that, and *A.* may recover it in his own name.

If a man bequeath another mans Goods, by the Civil Law, the Heir must either buy them, or tender so much in value

value to the Legatary. But both by the Common Law, and Law Ecclesiastical used in this Realm, such a devise is judged void.

There are several sorts of Goods which are said not to be devisable, as 1. Such as a man hath in the right of his wife, viz. Debts due to her, or things in action, or Chattels real, as Leases, for after the Husbands death, they return to the wife. 2. One may not devise Goods which he has joyntly with another, no though he make the other joynt Executor, yet he shall not be chargeable for those Goods, but adjudged to have them as survivor. 3. Neither may one bequeath those things which he hath, as Administrator to another, for he ought not to convert those to his own use, but therewith to pay the Debts and Legacies of the Deceased, and to distribute the rest in *pior usus*, and therefore bound to be accountable. 4. Albeit, the Executor of an Executor may administer Goods of the first Testator, yet so may not the Executor of an Administrator, but there must be a particular Administration of them granted: Also an Executor may appoint an Exe-

cutor of the first Testator's Goods, so may not an Administrator. Howbeit, an Executor cannot give away the Goods of a Testator, no more than may an Administrator, for they are not properly his, but he must accompt for them.

5. Goods of the Realm, such are the Crown and the Jewels thereof, are not devisable. 6. The Master of a Colledge, the Mayor of a City or Burrough may not devise things which belong to the Burrough, City, or Colledge; so it is also of an Hospital and Church goods; (excepting upon the glebe growing.) 7. Goods *de jure*, belonging to the Heir are not devisable, as Trees growing, the Heir-loom, &c.

Tenant in right of his Wife, sows Lands, and bequeaths the Corn, the Legatary shall have it, and not the wife, otherwise it is of Corn and Grasse not separated.

Tenant in Tayl makes Lease for Life to *A.* and dyes, the issue in Tayl recover Land against *A.* being second in *formacion*, this is lost.

A. hath a Daughter and dyes, his Wife great with child of a Son; the Daughter enters and sows the Land,
 shee

shee shall reap, though the Son be born before reaping time; But if after the sowing of Corn and before the Son born, the Mother recover Dower against the Daughter, and the ground sown be assigned to her in Dower, she shall also have the Corn.

Windows, Tables, wainscot, Benches, and the like, fixed or mortised in earth go not to the Executor, but to the Heir, for they are parcel of the Free-hold and to remove them is wast; Also Furnaces and Ovens, set in Mortar or Stone do belong to the Heir.

Windows,
&c.

Concerning the assigning of Tutors or Guardians; and the disposing of Childrens portions during minority. Divers Customs are in *England* observed.

Guardian.

A Father hath a paternal power and may appoint a Tutor or Guardian to his Child for a time, and the custody of his portion.

All but the Heir and such as are preferred in the life time of the Parents are to have filial portions of the Father's goods: But if there be no Testamentary, Tutor or Guardian, then the Ordinary may appoint the next of Kin, demanding the same, as in case of administration,

but if the Child be a Ward, the Ordinary may not do it. Neither can any one be a Tutor or Guardian, who may not be an Executor.

A Tutor or Guardian may be assigned to a Boy till 14. to a Female Child till 12. and then they may have Curators of their own choosing.

If a Child be a Ward, the Guardian shall have him, and all his Lands, and offering him a convenient marriage and at reasonable age, if they refuse, he shall have the value of their Marriage, which shall be rated according to the value of the Land; but this is now taken away.

But in Socage Tenure, if the Land come by the Mother, the Uncle on the Father's side, shall have the Guardianship, & sic è contra, and as such shall account to the Pupil for the profits of his Land at his full age.

Of Fools and Ideots, the King by his Prerogative Royal, hath the tuition of the body, and the profits of the Lands; but after the Ideots death, the Land shall return to the next Heir.

Copy-holder Heir under 14 years of Age, shall have a Guardian appointed him

him till *ra.* as the Mother, or next of Kin.

A Tutor may be appointed for a time, either simply, or upon condition, nay more than one may be appointed.

If the Testator say, I commit my Children to the tuition of *A.* or I leave them to his hands, or to his government; or I desire my Wife to take care of my Children, all these imply the Testators meaning to be so, and they shall be confirmed Tutors.

The Office of a Tutor is to provide for the Infant, faithfully to administer his Goods and Chattels, and to account for all received by him: and if any take away the Pupil or his Goods, he may cite them, and make them restore them in the Ecclesiastical Court.

The Tutor may sell *bona peritura*, but not Goods immoveable.

If a Testator Will that *A.* shall educate his Children, and have the disposing, setting and letting, of his Lands, yet he may not sell them, for the words, dispose, set, and let, properly bear no such meaning.

As to the disposing of Goods, we are to observe, that moderate Funeral expenses are to be paid out of the whole, and then

Distribution

then debts, *quaque suo ordine*, but if the Executor pay Legacies, and there be not sufficient left to pay Debts, he shall pay *de bonis propriis*, it being a waste in him. Cro. Eliz. 646. the 5 Report Duke and Littleton's Case. Cheynor Case. 33 Eliz. B. R.

If there be a Wife and no Child, or a Child or Children, and no Wife, the Goods shall be divided into two parts, and the Testator can but devise one half; but now see the Stat. 22 Car. 2. Cap. 11.

And if there be Wife and Children or Child, which Child is Heir, or which Children were advanced by his Father, in his life time, in such case, the Wife shall have half, and the Testator may dispose of the other moiety. But see Ratcliff's Case. 3. Rep. But it is also held that a Child preferred shall have as in Hotchpot if he will cast in his share. See Fitzh and Brook; *de rationabili parte bonorum*.

Although the Law leaveth all to be disposed of by the Testator, yet in many places he is restrained by Custom. But note, it seemeth he may disseize of Leases, especially where it is customable for the Wife and Children to have a *ratable* part

the Office of an Executor.

25

part of moveable Goods and Debts. *Bro. Tit. Exec.*

Patrimonium patris munus, because it is to prefer.

Matrimonium matris munus, because she is to nourish and breed up the Child.

If *A.* be seized of 30 Acres, and have issue 2 daughters, and he bestow 10 Acres in Frank-marriage with one of them, and dye seized of 20; the married Sister may cast up in *Hatchpot*, and have a new division and moiety.

CHAP. IV.

Exposition of Testaments.

Testaments shall be favourably expounded, and according to the intent and meaning of the Testator (which intent ought to be manifest and not doubtful. *Co. 6. Wild's Case*) because he is supposed to be *inops consilii*.

Words in a Testament seeming to tend to a condition, as (if, Provided, and such like) shall not be taken in Law for conditions, where the intent of the Testator, appeareth

appeareth not to defeat the whole Estate devised thereby, but for a limitation; as for example. *A.* seized of Lands in Fee, hath issue *B.*, which Lands he deviseth to *C.* in Tayl, the remainder to *D.* in Tayl, with divers other remainders, Provided, that if any of the In-taylees, bargain, or sell the Land, or any part thereof, that from thenceforth, such persons selling, shall be utterly excluded, and the Land to remain to the next in Tayl, as if such person had not been named in the Testament; in this case the exposition shall be, until such Person in the In-tayl shall alien, he shall have as before: and so it is a limitation, and not a condition. For if it were taken for a condition, then *B.* his Son should enter, for he only is *prius* (and none but *priuses* may enter for a condition broken) and then all the Estates were determined, which were contrary to the intent of the Testator. But by limitation it is otherwise. *Plow. fo. 412. Scholastica's Case.*

Only such Estate as cannot be by the rules of the Common Law conveyed by an Act executed in the life of the Testator, with advice of Counsell, such Estate cannot be devised by Testament, As if

A.

A. devise Land to B. in Fee, and if B. do not such an Act, that C. shall have the same to him, and his Heirs; this is void : for such limitation if it had been by Act executed, had been void. *Et sic de ceteris* Co. Rep. Corbet's Case fo. 86.

CHAP. V.

Of the Forms of Testaments.

THe substantial or essential form of a Testament is the naming of an Executor, without which it is no Testament : for the Executor is in the place of the Testator, and compellable to pay Debts so long as he hath Assets; without naming an Executor it is but a Codicil, be there never so many Gifts or Legacies contained therein, and Administration is to be granted, as of one dying intestate, unto the Wife or next of Kin.

But be it solemn, or unsolemn, written or *unincupative*, privileged or unprivileged, the naming or appointing of an Executor without more ado, makes a good Testament.

An

An Executor may be appointed simply or conditionally, from a time or to a time certain, generally or particularly in the first, second, third or fourth degree. Simple nomination, as, I make, Institute or Will that, or desire that *A.* be my Executor, or *A.* shall, or let *A.* be my Executor, or I commit all my Goods to dispose of by *A.* or I will that *A.* dispose of those Goods in his possession; in the first he shall be adjudged Executor of all; In the second of so much as are in his possession only.

The word Executor needs not always to be expressed in a Will, but *circumlocutory* words will serve, so as the Testator's meaning be certainly known, but when it is doubtful whether the person named be a general Legatary or Executor, great care must be taken to determine, whether a Will or not a Will.

A Testator makes his Will by entreaty or interrogation of another person, as if one demand if he will make *A.* Executor, and he answer yea, or I do, this is a good nomination, so as he be then purposed and intended to make his Will; for be the words never so plain, if the Testator were in fear, jest or drink, though he say I make

make *A.* my Executor, yet it is void, because he had not then *animum testandi*.

As nomination of an Executor is pure and simple, being without condition, so of Legataries, *mutatis mutandis*, in all things always according to the Testator's meaning: Therefore if *A.* devise to *B.* all his Lands and Tenements, all in possession and reversion pass by the word Tenements.

Land is devised to *A.* to have for evermore, or to him and his Assigns, there the devisee hath a Fee-simple; but in a Feoffment, such words create but an Estate for the Feoffee's life.

A devise of Lands is made to *A.* thus, to give or sell, or do with at his pleasure, this makes a Fee-simple.

A devise of Land is made to *A.* and his Heirs males, this is an Estate Tayl, but in a Feoffment the same words make only a Fee-simple, because thereby it does not appear of what bodies the Heirs shall be begotten.

Lands are given by deed to *A.* and the Heirs males of his body, he hath issue a Daughter, who hath issue a Son, and dies, the Son of the Daughter shall not have it, but it shall return to the Donor.

But

But if the same were so given by a devise in a Will, he, *viz.* the Son of the Daughter should have it.

A devise made to an Infant in the Mothers Womb is good, but contrary of a deed Feoffment, grant or gift, for they being made to such are void.

A devise is to *A.* and his Heirs Females of Land, the Devisee hath a Daughter and Son, and dyes, in this case the Daughter shall have the Land, and not the Son though he be Heir.

A devise of Land is to *A.* charging him with payments, of near the value of the profits during his Life, though there be word of Heirs, or Assigns, or for ever, yet this is a Fee-simple; But a devise of Land to *A.* in Fee, and if he dye without Heir, then to *B.* in Fee, this is a void remainder, because one Fee-simple cannot depend upon another. So Land was devised to the Prior and Covent of *B.* so as they paid to the Dean and Chapter of *P.* 10 *l.* per annum, and in default thereof, their Estate to cease, and the Land to remain to the Dean and Chapter, this is a void remainder, for it could not be limited after an Estate in Fee, and the Heir, not the Dean and Chapter shall take advantage of the condition.

the Office of an Executor.

21

A Legatary may take his Legacy without delivery by the Executor : But there is no remedy to recover a Legacy by the Common Law, but only by citation before the ordinary : But a Legatary possessor of his Legacy, at the Testator's death, may retain it, if there be sufficient to pay debts beside.

Conditions some are, 1. Necessary. 2. Some impossible. 3. And some possible or indifferent.

1. Necessary in respect of Fact, as if the Sun rise. 2. Necessary in respect of Law, as a condition to make one Executor or give 100 l.

2. Impossible conditions, and these have four sorts of Impediments. 1. Of Nature, as to give one 100 l. if he touch the Sky with his hands, or drink up the Sea. 2. Contrary to Law deemed impossible, as if he murder a Man, or deflower a Maid, for *id possumus, quod de jure possumus*. 3. Hard to be performed, as a base Subject to marry the King's Daughter. And 4, of contrariety and repugnancy.

3. Possible conditions or indifferent, of these, 1. Some are casual as to give 100 l. if the King of *Spain* dye this year,

C

2. Others

2. Others are Arbitrary, as if one go to Church. But here note, that conditions, unlawful, impossible and dishonest are absolutely void.

Every condition must be precisely performed, for performance in part will not suffice, for the whole meaning of the Testator therein, must be performed.

A condition that one go to Church on *Easter-day*, and he endeavours so to do, but he is hindred by great floods, or other lawful impediments, the condition is performed: But if in going to Church he commit an offence, and be stayed for it, this is not a performance of the condition, when the condition cannot be performed by the Testator's default, this is no bar to the Legacy, as a Legacy is given on condition, that he bury the Testator's body in *St. Peter's Church in York*, and he dyes excommunicate.

Executor or Legatary under some possible condition admittable, putting in caution to perform the condition, or make restitution.

Condition is, that *A.* marry the Testator's Daughter, he is ready and willing,

willing, but she refuses, this is doubtful, for he must persevere if he will have the benefit, for though it seem the condition be performed in Law, yet is it not performed in fact according to the Testator's meaning: But it is contrary if the Testator remitteth to him a Debt upon such condition, and he offereth to marry her: or if he be possessed of the Executorship, or Legacy in the mean time before she repent, or if 100*l.* in such a chest, or a white horse be given on such condition, upon the first refusal, the Executor or Legatary will have a right.

Condition is, he or she marry according to the appointment, arbitrement or consent of *A.* the condition is unlawful, but the Legacy is good, though the marriage be without such consent.

Condition is, that thou marry not a Widow, or this, or that particular Woman is good, and if thou perform it not, no Executorship or Legacy shall pass, because thou hast liberty besides.

A Legacy is given upon condition, that thou marry the Testator's Daughter, thou must not marry first another

Woman, and afterwards her; for it is a condition affirmative, and intended to be meant of first marriage, and so the Legacy is void. But in negative conditions, as if thou do not marry the Testator's Daughter; here if thou marry two or three, and her at the last, yet the Legacy is good, for here not the first Act alone, but all subsequent Acts are regarded.

A Condition, in respect of place is good: As that one shall not marry at York; for he is at liberty to marry elsewhere.

Land is given to a Man, and the Heirs of his body, on condition, he nor his sell by Feoffment, &c. Here, if he or his Heirs sell; the Donor or his Heirs may enter, for this is in favour of others, and herein the Common Law, and the Ecclesiastical agree.

Prohibition in a Will, to sell a Cup, Ornament, Gift of a Prince, Prize got in War, &c. is good, unless the Goods will not amount to pay Debts: or if it be so far from him, that he cannot have profit or use of it, he may sell it, or if he be the last, to whom it is limited.

One by his Will giveth *A.* the residue of his Goods, and makes him Executor, on condition he do not sell the same; *A.* must enter into Bond not to sell, before he can be admitted Executor: which Note,

As to time when conditions are to be performed, when no certainty thereof is expressed; it must be done as soon, as with conveniency it may after the Testator's Death.

A. makes *B.* Executor, on condition that he give 10 *l.* to the Poor, he may do it at any time in his life; but the Ordinary may appoint the time, and if he fail, may grant Administration. But a Legacy given on condition that he give 10 *l.* to the Poor, he must do it as soon as he is able after his Testator's Death, or else he will lose his Legacy.

There are also casual Conditions, as if a Ship come from *Venice*, thou must attend, and if it come in thy Life, good: but if thou dye before, thy Executor cannot have it, though it return after thy death.

Condition is, (if such a one dye without issue, this is much to be taken notice

of,) for a Bastard shall not be deemed issue, though the Parents inter-marry after the birth, and such are issue natural, not lawful, nor may they inherit. But if *A.* have issue by *B.* his Wife, this is lawful, not natural; so if one marry a Woman, with child by another, albeit born the next day, yet the Husband must be Father; *For whose is the Cow, his is the Calf.* If a Wife cohabit with an Adulterer, yet if it be possible that the Husband may come to her, the Husband shall be presumed the Father, nay though the Wife own the Adulterer, and the Child be like him, for that might happen by the Mothers conceit, at Conception, so *Jacob's rods, Ethiopian picture, &c.* but if the Husband were not at the time of Conception, within the four Seas, or far distant, or imprisoned, it will be judged otherwise; Also if disabled by Nature or old Age. In no case, such Children shall inherit.

If a child be born alive, and heard cry, the Father by the courtesy of *England*, shall have the Land for his Life, otherwise if it were an absolute abortion.

Remedy

*Remedy for Creditors and Legatories,
during the suspence of the
Condition.*

For they are due presently; therefore it is provided by the Statute of 21 H. 8. and 32 E. 3. that Administration be granted to the Executor for so long time as the condition depends.

If a Condition be delayed to be performed by an Executor, it being in his power, it is his fault, and he shall be excluded.

An Action against an Administrator shall abate, if there be an Executor which will prove a Will, after the Administration granted. The Ordinary may appoint a time to every Executor at the petition of Creditors to prove the Will, and if he refuse, Administration may be granted unto such as have interest until the condition be extant; or he may grant a Letter *ad tollendum bona defuncti*, but upon such letter an Action will lye against the Ordinary, as it might have done against the Administrator, yea though such one sell *bona peritura*, he may be sued as Executor in his own wrong.

Ten pound a year given to one by a Testator, till his Son attain 21 years of Age is good, till he should attain, though he dye in the mean time.

If the Executorship be only limited, and the time of Age not joyned to the substance, as I give to A. 100 l. and I will the same be payed when he comes to 21 years of Age, and he dye in the mean time, yet the Executor or Administrator shall recover it.

An Executor may be particular as of his Goods, &c. in *Tork-shire*, or Universal as of all his Goods: the particular Executor is only chargeable so far as he Administers, and cannot meddle with the rest: But if one make A. an Universal Legatary, or give him the rest of his Goods, and make no other Executor, he shall be deemed Executor, at least Administration may be granted to him.

Two are made Executors, one dieth, his Executor may not joyn with the first Executor in the execution of the Will: and if such Executor or Executor, have any of the Testator's Goods, the first Executor may have an Action for them, and if the surviving Executor dye intestate,

testate, yet the Executor of the Executor cannot meddle. Also if one Executor be a Babe, or beyond Sea, the other is admittable in the mean time.

If all or one Executor, refuse to undertake the Executorship, the other may sue or be sued: But first there must be summons and severance: but if the refusing Executor afterwards become willing, he may joyn with the Executor and be admitted, and if he release a debt due to the Testator it is good, so it be released before judgement.

One releases a debt due to *A.* and after takes Administration of the Goods of *A.* the release is void, for that there was no right of Action at the time when it was executed.

Two or more Executors, are named, all refuse but *A.* and he proves the Will, and after maketh *B.* his Executor, and dyes, the rest who refused may not joyn with *B.* but he may sue, or be sued alone, for the first Testator's Goods, *Bro. Tit. Exec. Dyer 35. fo. 160.*

Divers Executors are named, one getteth possession of Goods, the other have no remedy against him for any part, for one Executor may not sue another,

ther, but in case the Testator give to one Executor the residue of his Goods, he may retain them or sue any other that holds them; but if he give all his Goods to his Executors, they are to be divided and the Ordinary hath power to prevent fraud among them. But if one Executor dye, the survivor shall have his part, unless the Testator appoint that the Goods shall be equally divided, for those words (equally divided) in a Will, do make a Tenancy in common.

Two Witnesses void of exception, sufficient to prove a Will: but if the Testator ordain that one Witness whom he nameth and trusteth shall prove the Will, and he doth it, this is good proof; But a solemn Testament must be proved by seven Witnesses, and every one must set his Hand and Seal to it.

Any Language, Hand, or Character is good for a Will, so that it may be understood, & *vitium Scriptoris* will not hurt, for as *falsa Orthographia non vitiat Chartam: Sic nec Testamentum.*

In Nuncupative Wills and Testaments it is good to avoid obscurity and ambiguity.

CHAP. VI.

What Persons may be capable of Executorship or Legacies.

A Testator may exclude his own Children, and make a Stranger his Executor, or Villains; if he make a Villain of his own Executor, it is a *manumission*; but a Villain of another being named Executor, may have an Action against his own Lord.

A Woman sole is Executrix, she marries, her Husband alone may release a Debt due to the Testator.

An Infant Executor, may release a Debt due to his Testator, during his Minority, so as he receive due satisfaction for the same.

If a Child be under 17 years, he must have a Tutor, and such Tutor may sell any of the Testator's Goods, but for necessity only.

An Appendix to

A Testator making his Debtor Executor, the Debt is extinguished if he prove the Will : Also making a Creditor Executor , when he makes an Inventory, he may detain his own Debt first.

A. and B. bound to C. for Money, C. makes A. Executor, by this the Bond is released ; A. indebted to C. the said C. makes A. and F. Executors, A. dies, F. shall have no Action against the Executor of A. for that Debt : But if the Testator be indebted to A. and makes him and B. Executors ; if A. refuse to prove the Will , and B. prove it, A. may have Action for his Debt against B: so Debt by Testator is not extinguished by naming a Creditor Executor, unless he Administers : But Debtor refusing to Administer , being named Executor, the Debt is extinct unless there want Assets to pay Creditors.

A Colledge, City, or University , may be appointed Executor : but an *Apostate* is incapable to take or make Executor : So Felon attainted, and excommunicate persons.

the Office of an Executor.

43

Church-Wardens, are no lawful Corporation in every respect, but in some respects they are such a Corporation, as may sue for a Legacy given to the Parish.

Convict Recusant at the Death of the Testator, or time of Administration granted, disabled to be Executor, Administrator, or Guardian in Socage or Chivalry. See the *Stat.*

3. *Jacobi.*

CHAP.

CHAP. VII

Of the several kinds of Executors.

THere are three sorts of Executors.

1. From the Law, as the Bishop, or Ordinary. 2. The second is made by the Bishop or Ordinary. 3. The third by the Testator himself.

If an Executor refuse, or cannot prove the Will, the Ordinary may grant Administration, *cum Testamento annexo*, and this Administrator is charged to perform that Will, and is called *Executor Dativus*, for he is the Ordinaries Deputy or Steward.

The Ordinary may call to an account, and revoke his Authority, and such revocation may be secret or implied, as Administration granted to *A.* and after to *B.* the grant of the later revoketh the first, as a latter Will revokes a former, yet all Acts done by *A.* before such

revo-

revocation are good, 27 H. 8. 26. *per. Fitz.*
 4 H. 7. 14. *per Tremaille. Bro. Novel Cas-*
ses 330. Executor Testamentarius, being
 one so made by the Testator, may with-
 out Authority from the Ordinary possess
 himself of his Testator's Goods and
 Chattels, and after probate of the Will,
 may commence Actions. But if he be a
 meer Executor, he may not convert the
 residue of the Goods to his own use, but
 be accountable for them, neither is he
 to have any other benefit than what is
 appointed by the Will, or allowed for his
 charges or pains by the Ordinary, and if
 such Executor dye intestate, from thence-
 forth his Testator shall be said to dye in-
 testate, and Administration *de bonis non*
Administratis shall be granted.

An Executor (some say) is not com-
 pellable to prove the Testament before
 citation: but if he be cited and refuse,
 he shall lose his Legacy, and the Ordinary
 may grant over Administration to ano-
 ther, until he will accept, &c. but if he
 hath meddled with any of the Testator's
 Goods, he is compellable to stand to it.

If Administration be granted, where a
 Will may or can be produced, and the
 Executor hath not refused, the Executor
 may

may bring an Action of Trespass against
such Administrator, if he meddled, *Vid.*
Br. Abridgement des cases edit 1599. Tit.
Administ. 112. fo. 183.

*To him that is desirous to know, whe-
ther it be better to accept, or re-
fuse Excentorship it is to be
known. That,*

Executor is chargeable to Creditors so
far as the Goods do extend, but for Debts
due to the Testator, he shall not be char-
ged with Asses, for they are things in
Action, and not in Possession, yet he
must use diligence to obtain, and get
them in.

The Heir shall have none of the Goods
or Chattels of the Deceased, nor shall
the Executor have any of the Lands,
Tenements, or Hereditaments, unless the
Will appoint them to sell Lands, for which
if two or three be appointed, and some
refuse to prove the Will, the rest that
prove it may sell notwithstanding.

If the Testator appoint his Executor
to sell Land, and to distribute the money
in *pior usus*, and they enter and convert
the profits to their own use, for two or
three

three years, the Heir may enter upon them, and exclude them, for the Franktenement is in him; neither if one Executor dye before sale, may the survivor sell, but contrary if the limitation be for payment of the Testator's Debts, for then the surviving Executor may sell. 39 *Ass.* 17. And it seemeth by the issue in that Book that any one of the Executors may by himself sell the Land without his Companions though they be alive, and notwithstanding that they have but a power and Authority given them, which is joynt, and in most cases must be performed according to the limitation, but it seemeth that, that is admitted for the special respect the Law hath to have the Debts of the Deceased paid. *Vid. Fitz. Tit. Ass: 336. Et Executors 117.*

An Executor may recover or distrain, for Rents, Fee-Farms, Annuities, and Arrearages, as his Testator might have done; Also the Husband may do the like, for rent due to his Wife she being dead.

An Executor of an Executor in all cases may sue for the first Testator's Goods, and be sued for his Debts, as the first Executor might: neither shall the

D

Goods

Goods of the first be put in Execution for the second Testator's Debt, but those Goods must come to the second Executor by relation, and thereby the property of them which was before in the first Executor, is conveyed to his Executor.

A. being Administrator to *B.* names *C.* his Executor and dyes, *C.* may not meddle with the Goods of *B.* but new Administration shall be granted to the Friends of *B.*

If an Executor after due admonition given, refuses to prove the Will, he shall lose his Legacy, but contrary if he were not summoned to stand to it. Neither doth a Wife lose her thirds, nor Children their filial portions by refusing to prove the Will.

A Wife Executrix cannot sue or be sued without her Husband, but she may do any extrajudicial act, as receive or release Debts, or pay Legacies without her Husband: But if she dye he can no more meddle: And such Wife Executrix may make her Will, and name an Executor.

If there be three or four Executors, two or one may release any Debt without his companions, unless it be upon
Judge.

Judgement: But it is not so with Administrators, for they have but one Authority given them by the Bishop over the Goods, which Authority being given to many is to be executed by all of them together.

An Executor must pay Debts, before Legacies, else if thereby arise a want of payment of Debts, he shall pay out of his own Estate. Here note, that of Debts, some are to be preferred before others, *Cro. Eliz.* 646. as Judgement before Recognizance, &c. *5 Rep.* 28. *Harrison's Case*, *Leon* 3. 270. *Bond and Bayl's Case*. So some Legacies are to be preferred. 28, 29 *H. 8.* *Dyer* 32. 4 *Eliz.* *Dyer* 280, or 208 *Dyer.* 7 *Eliz.* 232.

As to the time for proving a Will ^{Time.} it is Arbitrary, first year or second, or when it shall please the Ordinary to send a citation.

The duty of the Executor, is to prove the Will, pay the Testator's Debts, and Legacies, and make an account for the residue, and therefore the Inventory ought to be made before the Executor meddle with the Goods; Into which Inventory are to be put, Goods, Chattels, Merchandizes, all Rights and Leases, ^{Office.}

Emblements, Corn growing, (but not Grass or Trees growing, for those belong to the Heir, so do things affixed to the Free-hold, also Glasse in Windows, nailed or not nailed, Wainscot and the like) but all other Goods and Chattels are to be put into the Inventory, and the Ordinary may appoint a time to bring in the Inventory. See the Stat. 22 & 23 Car. 2. Cap. 11. But an Executor meddling with Goods, unless for Funerals, &c. not having made an Inventory, is subject to Ecclesiastical censure, although the Acts done by him before Probate are good in Law.

Testaments are to be proved before the Bishop of the Diocess, except in certain Seigniories or Jurisdictions, or where there are *bona notabilia* in divers Diocesses, and good Debts amounting to 5*l.* due by one or more in some other Diocess or particular jurisdiction, yet within that Province, do make *bona notabilia* as well as Goods and Chattels, real or personal.

If the Metropolitan pretend that a Man within any Diocess of his Province dye possessed of *bona notabilia*, where indeed he hath none, and grant Administration,

stration therefore of the Goods, this is not absolutely void, because the Metropolitan hath Jurisdiction in all Diocesses within his Province, yet nevertheless it is voidable. But if the Ordinary of a peculiar Jurisdiction, grant Administration of the Goods of one dying possessed of *bona notabilia*, this is absolutely void, even for the Goods in his own jurisdiction: for the Prerogative Court ought to grant the same.

A Will is to be proved two wayes, the 1. in *Communi forma*, and here no person is cited, but the Executor makes Oath that it is the Testator's last Will. Or, 2. In form of Law, and this must be done *per testes* wherein there must be publication and a definitive sentence.

A Will proved in common form in absence of them which have interest, the Executor is compellable to prove the same again in form of Law, and if the Witnesses be dead, it will endanger the whole Testament, unless 10 years be past since the *Probate*: But being once proved in form of Law, no more to be drawn in question.

Fees due for *Probate* of Wills are, if the Goods be under 5 *l.* six-pence to the

Register: if above 5*l.* and under 40*l.* three shillings six pence to the Ordinary, and to the Register one shilling. If above 40*l.* to the Ordinary 2*s.* 6*d.* and as much to the Register by 21 H. 8. For the copy of the Will and Inventory, no more than was payed to the Register for Probate, or a penny for ten lines at the Register's Election: upon forfeiture of the overplus taken, and 10*l.* to the King and the Informer.

The course of Debts in order to payment we have already spoken of, we shall only here note, that if there be divers Obligations, the Executor may pleasure which of the Creditors he pleaseth first, and the other have no remedy, though Assets be wanting. *Dodder and Stud. Lib. 2. Cap. 10.*

If two commence Suits for several Debts, he that first obtains Judgement shall first be paid, an Executor may plead a dilatory plea, as in abatement of the Writ, by Essoyn, imparlance to one, and then another commence a Suit, to whom he confesses a Judgement, that Judgement shall be satisfied first, though the others Suit was commenced before: But an Executor may not plead a false plea to delay

delay him that first commenced Suit.
Doct. and Stud. Lib. 2. Cap. 10.

Mortuaries.

No Mortuary is to be paid under ten marks in moveable Goods, upon forfeiture upon *surplus*, and 40 s. to the party grieved, by 21 H. 8. neither is it payable but where accustomed, and due but in one place, where the party was most inhabiting.

Above ten marks clear, his Debts being paid, and under 30 l. shall pay for a Mortuary 3 s. 4 d. between 30 and 40 pound, 6 s. 8 d. above 40 l. shall pay 10 s. and this is to be paid before a Legacy without defalcation.

Account.

It is necessary that an Executor make his account and procure his discharge by Acquittance or otherwise, for he is subject to be called to an Account judicially, both by Creditors and Legataries, and that within a year, or when the Ordinary pleases, wherein he must declare what Goods and Chattels, have come to his

hand, what Debts and Legacies he hath paid, in which lesser sums may be proved by his own Oath, and greater sums by Witnesses: And the residue ought to be disposed as heretofore in *pior usus*, but the Executor hath usually detained them, upon pretence more Debts may appear. But see what is now to be done by the new Stat. 22, 23 Car. 2. Cap. 11.

In this account, all Funeral expences, just payments, and reasonable charges are to be allowed.

An Executor not being resolved to meddle as Executor, then must not Administer the Goods as Executor, for then he is compellable to undertake the burthen: in the mean time he is subject to all suits of Creditors, and cannot sue for want of the Will being under seal of the Ordinary.

If a Creditor take but so much of the Testator's Goods as his own Debt amounts to, yet he is Executor in his own wrong: But to take the Testator's goods to preserve them from perishing or to dispose of part thereof for the Funerals, or to make an Inventory, makes him not Executor in his own wrong.

CHAP.

CHAP. VIII.

How Testaments become void.

TESTAMENTS become void by several means, as when they are made through fear, immoderate flattery, fraud, incertainty or imperfection, or the Testator hath not *animum testandi*. But if such a Testament after the fear is past be confirmed or ratified, it will be good.

Errour in quality to avoid a Will is this, as I make my Cousin J. my Executor, or because thou hast lent me 100 *l.* I give thee 100 *l.* or for that my Son is dead, thou shalt be my Executor, when in truth there is no Cousin J. no Money lent, nor his Son dead.

Errour in quantity is, when a Testator meaning to bequeath a fourth part of his Goods, it is set down half, or intending to give 50 *l.* the Writer setteth down
100 *l.*

100 *l.* or *contra*; or I give to *A.* all the Debts he or *B.* oweth, and he owes nothing, all these bequests will be void.

But if one give *A.* 10 *l.* which he owes him, if the Testator be in good memory at the time of the gift this is good. So if one give 10 *l.* being in such a chest, and there are but 5 *l.* found, yet it will be good for the 5 *l.* But if the Testator believed 10 *l.* to be there, unless the Executor can prove that the Testator knew there was but 5 *l.* it shall be good for the whole 10 *l.*

A Will may also be void for incertainty, as I make one Man of the World my Executor, unless there be plain proof whom the Testator meant, it is absolutely void.

One made his Will, and named *J. S.* his Executor, whereas there were two or three of that name, this shall be void to all, unless the Testator's meaning appear to one or one more familiar or friendly with him, then he shall be admitted; or if they be all of Kin, the nearest of Kin shall be admitted.

— If one give a Legacy to a Church, his Parish Church shall be understood, so a
Le-

the Office of an Executor.

Legacy to the Poor, shall be intended to the Poor of his own Parish, but if he have any poor Kindred, they are principally to be regarded.

It hath been held that the Mother is not a Kin to the Child, and to that purpose it was long argued in the Duke of Suffolk's Case, 39 H. 6. fo. 31. but since hath been adjudged to the contrary, 3 Rep. Ratchiff's Case, and 21 H. 8. 5. Or if one make the next of Kin Executor, the Mother shall be admitted before any but his own Children, viz. before either Brother or Sister, according to the Stat. 21 H. 8. See Bro. Novel's Cases 5 E. 6. Num. 415.

A Testator gives a Horse and hath none, yet it is a good Legacy: the contrary hath been held by some of Sheep, or a gold Chain, that if there be none, the Legacy is void, but the better opinion is that it is good.

A Legacy of Lead, Money, Wheat, &c. is uncertain, and so naught, but if it be added for building Bridges, repairing High-ways, maintaining or relieving Poor, then so much as by the Ordinaries appointment shall be thought fit, shall go to perform the intent.

Bona

An Appendix to

Bona animi, corporis, fortune, viz. Virtue, Health, Wealth, are by the civil Law termed. 1. Moral. 2. Natural. 3. Casual. The first and second are not in our dispose, and therefore the Law takes notice of the third, *viz.* casual, under which the civil Law takes in Lands, Leases, Obligations, Debts, and all other Goods, his Debts paid. But the Law of this Realm takes in only Household-Goods, Chattels personal, &c. But nothing that is of the Nature of Free-hold, nor Leases for years, (much less for life) nor *Choses* in Action, as Debt upon promise or Obligation.

Chattels signifie all Goods, moveable and immoveable, unless such as be of the nature of Free-hold; Of Chattels some be real, as Leases for years, some personal as moveable Goods, Money, Plate, Household-stuff, &c. but Hawks and Hounds are no such Goods.

Goods moveable are such as actively move of themselves, or passively are moved by others.

Immoveable Goods are such as are not dependent upon the person, but to some other things, as Trees growing, Fruit on Trees, Lease or Rent for term of years.

years. But no Lands, Tenements, or Franktenement.

Admit four several persons, make four several Wills, wherein the first gives *A.* all his Goods, the second gives *A.* all his Chattels, the third gives *A.* all his moveable Goods, and the fourth gives to *A.* all his immoveable Goods. In this case, *A.* is to have the first Testator's whole Estate, being in effect his Executor, Heir or Universal successor: Also he is to have all his Debts, and pay all his Debts, and all his Money of what Coyn or Mettal soever. And so it is as to the second Testator in all things, And if *A.* dye before he prove such Will, Administration is to be granted to the next of Kin of *A.* not of the Testator: But the Testator giving *A.* all his Goods or Chattels, if he make *B.* his Executor, *B.* must enter to all, prove the Will, pay the Debts and deliver over the *residuum* to *A.* being Universal Legatary. But if the Testator have 100 *l.* and being indebted 20 *l.* bequeaths the one half of his goods to his Wife, the whole to be divided, between her and *A.* his Executor, here the Wife shall have 50 *l.* without defalcation, and the Executor must pay

pay the Debt out of the other half, which are Assets in his Hands, and this case was so adjudged by two chief Justices and others.

For the third Testator *A.* must have *bona moventia & mobilia*, all actively and passively moving or moveable, as also Fruits growing by Industry, as Corn, &c. but not Natural, as Grass, &c. but if Land be appointed to be sold by Will, the Money thence arising shall not be accounted as any of the Testator's Goods or Chattels: Or if a Testator have bagged up Money, ready shortly to be payed for Land bought, this may not be disposed of in prejudice of the Heir. For the fourth Testator, by the word immoveable Goods, pass all natural fruits, as Grass growing, Fruit on Trees, Fish in a Pond, Pidgeons in a Dove-Coat, &c.

Goods moveable and immoveable, are given as a Legacy, it hath been much disputed, if Debts and Obligations pass, and it is agreed that they do, and also Rents and Arrearages thereof behind; but such a Legatary of moveable and immoveable Goods cannot sue for such Rent, Arrear, or Debt in his own Name,
for

the Office of an Executor.

for the Executor must recover them, and then may he sue the Executor in the Ecclesiastical Court for the same, and if the Executor refuse to sue the parties, the Ordinary shall compel the Executor to give one or more, Letter or Letters of Attorney to the Legatary to sue for the same in the Executor's name, but to the use of the Legatary himself.

A. gives all his Householdstuff to *B.* by this *B.* shall have Tables, Stools, Forms, Chairs, Carpets, Hangings, Beds, Bedding, Basons, Ewers, Candlesticks, all sorts of Vessels, serving for Meat, Drink, being either of Earth, Wood, Glass, Brass or Pewter, Pots, Pans, Spits, Kettles, and such like; But Books, Weapons, Tools for Artificers, Cattle, Victuals, Corn in a Barn, Carts, Plough-gear, and Vessels fixed to the Free-hold are not so esteemed.

Plate used in the House, as Cups, Bowls, Candlesticks, &c. are Householdstuff, but such as are kept only for shew or Ornament, being no otherwise used, shall not be reckoned as Householdstuff, unless the Testator's meaning appear in plain words otherwise.

If after a Testator's Death, there be found

found two Wills, the one made in favour of his Children; the other in favour of Strangers, that to the Children shall be confirmed. But if one Testament be proved, and the Executor possessed of the Goods, it is not afterwards to be disproved, or he dispossessed by means of another Will of the same date.

There are two Testaments, one to Children, another *ad pios usus*, both of one date, that to the Children shall have the priority.

A Legacy is given of all his Debts, no more will pass than those Debts then due, not such as grow due after the Will made. So if a Testator releases to A. all his debts, such as grow due after the release made shall not be discharged. The like of Apparel, Books, Householdstuff, &c.

But in these and all Cases the mind of the Testator must be respected.

A Testament begun, though not finished is good, so far as it is proceeded in.

A draught of a Will not acknowledged by the Testator is no more a Will, than a draught of an Obligation is an Obligation unsealed.

A Testament found written, with the Testator's hand in a Chest amongst other Writings of account shall be good; if the same be dated and perfect.

The last Testament is best, and doth abrogate and annull all former, although the Executor refuse or dye before, or after the Testator. But if the latter Testament be imperfect or the Testator compelled by fear or fraud to make it, it is void.

A Testament made 10 years before death is nevertheless good whatever after may happen: But a Testament is presumed to be revoked, when the Testator and Executor become great Enemies; Also when the Testator in heat of Anger conceived against his Son, or such as should have Administration and afterwards they are reconciled.

A Testator after a Will made is attainted of Treason, Felony, Heresie, or Apostacy, &c. unless he obtain a pardon or be otherwise restored, the Will is naught.

If an Executor cannot, or will not prove a Will, it loses the name of a Testament, and must be affixed to an Administration, yet the Legacies are still due.

An Executor must be capable at three several times. 1. At the making of the Will. 2. At the death of the Testator. 3. At the time of *Probate* thereof. But in conditional Testaments, the Executor and Legatary being capable at the time of the condition to be performed is sufficient.

Ademption of Legacies.

A Ship was given for a Legacy, which was afterward so repaired that little, yet some of the old remained, that makes the Legacy good; so of a house repaired after a Will made: but if the old house be wholly pulled down, and new builded of other stuff afterwards, this makes the Legacy void, so if blown down or fired by chance and new built: or if the Testator after the Will made, sell or give away the same, this takes away the Legacy.

A Testator gives an Obligation to A. and after this the Obligor payes the Testator the Debt in ademption: but if the Testator constrain him to pay by course of Law, there the Legacy is extinguish'd.

Transf-

Transferring of Legacies,

From one to another, as a Legacy is given to *A.* provided if *A.* will not do such an Act to be void to him, and *B.* to have it: *A.* dyes, yea before he can do it, yet was always willing to have done it, here the Legacy is not transferred.

A Testator gives 100*l.* to *A.* upon condition he pay for 10 years 10*s.* a year to the poor of *C.* and after he gives the same 100*l.* to *B.* without any condition, yet *B.* must perform the first condition.

Lands are given by Will, *viz.* in the beginning of the Will to *A.* in Fee, in the latter end to *B.* in Fee; this is to be decided by the Temporal Law, whereby *B.* is to have it, because it is the latter devise, & *ratio partis ad partem ad totius ad totum.*

If Legatary become Enemy to the Testator, or give him a secret cause of hatred, though unknown to the Testator, by which (it may be supposed) that if he had known it, he would have taken away or destroyed the Legacy, this will make the Legacy void.

If a Wife depart from her Husband without consent, or a Legatary accuse his Testator of a capital crime, or become a capital enemy to the Testator's Brother, or if the Legatary neglected to help him in sickness through want whereof the Testator perished, or grievously defamed or slandered the Testator, any of these will cause him to lose his Legacy.

A Legacy of 100 l. is given to A. to be paid him at Easter 1675. A. dyes before Easter, yet his Executor or Administrator shall recover, because it was due at the death of the Testator. But if 100 l. be given to A. when she shall be married, and she dye before marriage, the Legacy is lost. But if it be given for and towards her marriage, and she dye before, yet her Executor or Administrator shall recover it.

Debt is brought against the Ordinary, who, pending the Writ, commits Administration to J. S. the first Writ shall abate, because the Ordinary is compellable to grant the Administration by the Stat. Bro. Trin. Administ. 39. 31 E. 3. cap. 11. Rest. Administrators. 1. and 21 H. 8. cap. 5. Rest. Probate of Testam. 3.

Where

the Office of an Executor.

Where the Ordinary commits Administration, he may revoke it and grant it to another (but all acts done by the first Administrator shall be good) and so it was held in the case between *Brown* and *Shelton* for the Goods of *Rawlins*, where the Administration was committed to *Brown* and revoked, and committed to *Shelton*, because it was not an interest, but a power or authority only; which may be revoked: but the contrary is held of an interest certain. *Bro. Administrator*, 33. *in fine.*

If an Executor plead fully Administered in an Action of Debt, and give in Evidence, payment of Legacies: The Plaintiff in the Action of Debt, may demurr in Law thereupon, because such Administration is not allowable, in Law before Debts are paid. *Bro. Tit. Assets intermaines* 10.

An Executor before Probate makes his Executor and dyes, his Executor shall have Administration, 3 *Eliz. Dyer* 372. *Isted's Case.*

Where an Executor hath the *residuum* given him, there Administration shall be granted to his Executor, but where the *residuum* is not so given, the

next

next of kin shall have it. *London's
Case. 3d. Rep.*

I shall only add what hath very
learnedly been held by a most Wor-
thy and Honourable Person, and of
profound reading in the Law, concern-
ing the Ecclesiastical Court, viz. That
it had not Original Jurisdiction, and
that what Jurisdiction the Church
claims, was given to it by the King,
and that is proved by four principal
reasons.

1. That the Ordinary had not
any power to dispose *bona peritura.*
*9 Elizab. Dyer 255. 5 Rep. Needham's
Case.*

2. If a Debt were due to the Testa-
tor or intestate, the Ordinary had not
power to recover it, nor could he
commit it. *Co. 2. Inst. 398. F. N. B.
fo. 91, 92.*

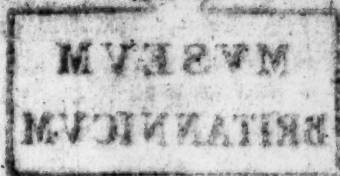
3. It is a Lay thing, and some
at this day have power to dispose,
who are merely Lay. *Co. 5. 16. 5 Rep.
fo. 65. B.*

4. For the manner of Trial, it
must be in the Temporal Court. *13 Eliz.
Dyer 294.*

Much

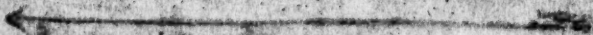
the Office of an Executor.

Much more might be said in this point, which for the greatest part being mentioned in the fore-going Book. We will here set up at present our rest:



FINIS.

THE
MUSEUM
BRITANNICUM
LONDON
1800



FINIS



